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English-speaking people throughout the Western world. See Daniel W. Howe, Victorian Culture in American, in Victorian America 3, 16-17 (Daniel W. Howe ed., 1976). For these reasons, research for the historical sections of this Article relies on U.S., British, and Canadian sources, and employs a generic notion of "Victorian" sexual values.

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In the late nineteenth century, the tort of seduction was among the most common civil actions. n32 Appellate case records for the United [*384] States indicate that all-male juries n33 were sympathetic to claims made by fathers of seduced women. As a North Carolina court put it in an 1844 decision: "He comes into the court as a master -- he goes before the jury as a father." n34 Few plaintiff appeals were reported from this period in any state, a scarcity which suggests that juries found for fathers in most instances. n35

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n32 Cf. id. at 50 (case incidence data from Canada); Constance Backhouse, The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada, 10 Dalhousie L.J. 45, 45, 73 n.82 (1986) (documenting high percentage of seduction cases compared with other types of cases involving women) [hereinafter Backhouse, Fathers and Daughters].

n33 Women's right to serve on juries was granted on a state-by-state basis. In 1870, Wyoming became the first state to allow sexually integrated juries. See Grace Raymond Hebard, The First Woman Jury, 7 J. Am. Hist. 1293, 1293 (1913). American women did not win the constitutional right to have their names automatically included in jury pools until 1975. See Taylor v. Louisiana, 419 U.S. 522, 535-37 (1975).

n34 Briggs v. Evans, 27 N.C. (5 Ired.) 16, 20 (1844).

n35 In Canada, as many as 90% of nineteenth-century seduction plaintiffs prevailed before the jury. See Backhouse, Petticoats and Prejudice, supra note 31, at 50, 352 n.30; Backhouse, Fathers and Daughters, supra note 32, at 80. No comprehensive data are available on the rate of plaintiff success in seduction litigation in the nineteenth-century United States. The case law, however, contains few plaintiff appeals, suggesting that plaintiffs were winning at trial in the United States as well as in Canada. A similar pattern of few plaintiff appeals also characterized breach-of-promise-to-marry cases from the same era. See Mary Coombs, Agency and Partnership: A Study of Breach of Promise Plaintiffs, 2 Yale J.L. & Feminism 1, 16 & n.114 (1989). Damages awarded by juries often amounted to hundreds of dollars, an amount far in excess of the actual value of a daughter's lost wages or household service. These generous awards suggest that juries were covertly compensating fathers for emotional and moral injury as well as for loss of services. See Backhouse, Petticoats and Prejudice, supra note 31, at 50 (Canada); Sinclair, supra note 28, at 46-47 (U.S.).

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As the nineteenth century wore on, however, the relationship between fathers and daughters began to change in ways that eventually undermined this broad social acceptance of the seduction tort. Urbanization and expanding wage

labor opportunities took young women outside the home to work, eroding fathers' control over their daughters' activities. n36 Many unmarried women gained unprecedented personal and economic independence by taking work in factories and domestic service, n37 and some began to live apart from their families before marriage. A mid-century farmer's letter to his foster daughter [*385] working in a mill provides poignant testimony to the impact of this change on relationships between fathers and daughters: "You now feel & enjoy independence[,] trusting to your own ability to procure whatever you want, leaning on no one[,] no one depending on you." n38

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n36 In his collection of letters chronicling the experiences of young female factory workers in the mid-nineteenth century, Thomas Dublin identifies the social function of the factory in a young woman's life: "Work in the mills functioned for women rather like migration did for young men. . . The mills offered individual self-support . . . and gave them a measure of economic and social independence from their families. . . ." Thomas Dublin, Introduction to Farm to Factory: Women's Letters, 1830-1860, at 23 (Thomas Dublin ed., 1981). See generally Alice Kessler-Harris, Out to Work: A History of Wage-Earning Women in the United States 33-35, 37-38, 41 (1982) (describing unprecedented measure of independence given young women by creation of female wage labor opportunities).

n37 By 1890, 40% of single women and five percent of married women in the U.S. were wage earners. See Carol Groneman & Mary Beth Norton, Introduction to "To Toil the Livelong Day": America's Women at Work, 1780-1980, at 3 (Carol Groneman & Mary Beth Norton eds., 1987). Most single women worked only until they were married; married women entered and left the wage-earning work force depending on the economic need of their families. See id. at 53-58. At the turn of the century, most paid women workers were domestic servants, with a smaller but significant number of women working as factory laborers. See id. at 3, 115.

n38 Letter from Luther M. Trussel to Delia Page (Aug. 24, 1860), in Dublin, supra note 36, at 166.

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Economic and personal independence for unmarried women naturally meant greater sexual freedom. Many young working women had sexual relations with men they met in this wider world away from parental supervision. n39 Given women's sexual and social vulnerability, men also acquired new opportunities for sexual advantage-taking. Young working women were extremely vulnerable to sexual exploitation by employers or coworkers. n40

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n39 Premarital pregnancy rates at the turn of the century indicate that around 20-30% of young women were sexually active before marriage. After faling to a low of 10% in 1850, the premairtal pregnancy rate rose dramatically between 1880 and 1910, to between 20-30%. See D'Emilio & Freedman, supra note 30, at 199.

n40 In a typical early nineteenth-century case, a sixteen-year old immigrant girl who spoke no English was allegedly seduced and impregnated under threat of dismissal by the son of the family with whom she was employed as a domestic servant. See Welsund v. Schueller, 108 N.W. 483 (Minn. 1906). The Minnesota court dismissed the claim for lack of standing, because the girl had sought to bring the suit on her own behalf. See id. at 484; see also Backhouse, Petticoats and Prejudice, supra note 31, at 60 (asserting that most seducers were women's "masters, or male relatives of their master[s], or hired men working within the same or nearby households").

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Against this background, the familial and social tensions created by young women's growing independence also led to changes in the law of seduction. Between 1846 and 1913, nineteen states enacted seduction statutes that codified the cause of action and altered key elements of the tort. n41 All but one state explicitly abandoned the original property basis for the tort and recognized seduction as a personal injury. n42 The loss of services requirement was removed, and the moral and emotional investment in sexual chastity was recognized as a legally protected interest. n43 [*386] Damages could be awarded apart from any economic loss. n44 Beginning with the Iowa statute enacted in 1851, n45 most (but not all) reform statutes also allowed the seduced woman to sue in her own name, replacing her father as the plaintiff and real party in interest. n46 Thus, legislation in about half of the states brought the seduction action into line with its real social basis in that era: the prevailing sexual morality and economic reality that made premarital sexual experience or single motherhood an obstacle to a woman's chance to work and to marry, and therefore a devastating social injury. n47

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n41 The states were Alabama, Alaska, California, Georgia, Idaho, Indiana, Iowa, Kentucky, Michigan, Mississippi, Montana, Nevada, Oregon, South Dakota, Tennessee, Utah, Virginia, Washington, and West Virginia. See Sinclair, supra note 28, at 61 & n.209; see also Backhouse, Petticoats and Prejudice, supra note 31, at 60-61 (discussing legislative reforms in Canada giving fathers standing to sue for seduction, even when their daughters were residing away from home).

n42 See Sinclair, supra note 28, at 61 & n.211.

n43 The loss of services requirement had always been something of a fiction in practice. "[S]light evidence" of valuable services by a young woman had long been sufficient to satisfy the loss of services requirement, including such acts as "making tea, mending clothes, or other such like acts." Ball v. Bruce, 21 Ill. 161, 162 (1859); see also Sinclair, supra note 28, at 41 (asserting that, as imported to United States from English common law, tort of seduction was already "well on the way to being based in morality and honor despite its historical roots in the economics of lost services").

n44 In a parallel development to these statutory reforms, the loss of services requirement was also greatly relaxed for the common law action, although the requirement was never abolished outright. See Sinclair, supra note 28, at 62-64. Plaintiffs suing at common law were still required at least to allege loss of services. After 1850, however, courts generally acknowledged personal injury as the real basis for the seduction action, in both its

statutory and common law forms. See id.

n45 Iowa Code tit. 19, ch. 100, @@ 1696-1697 (1851).

n46 See Sinclair, supra note 28, at 61 & n.211 (noting that reform statutes of five of the 19 states -- Georgia, Kentucky, Michigan, Virginia and West Virginia -- did not create standing for victim).

n47 The social injury suffered by seduced women did not escape judicial notice. In finding the fact of seduction relevant to the calculation of damages in a breach-of contract-for-marriage suit, the Michigan Supreme Court observed:

In many cases[,] the loss sustained for a breach of the agreement to marry may be but slight indeed; but never can this be the case where the life-long blight which seduction entails enters the case. Respectable society inflicts upon the unfortunate female a severe punishment for her too confiding indiscretion, and which the marriage would largely, if not wholly, have relieved her from.
Bennett v. Beam, 42 Mich. 346, 351 (1880).

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Allowing the seduced woman standing to sue in her own name had a paradoxical impact on popular and legal acceptance of the seduction claim. The volatile issue of the woman's consent to sex moved squarely into the center of litigation, thereby triggering all the confused social responses created by young women's growing personal and sexual independence. When the father alone could sue on the daughter's behalf, the issue of her consent was irrelevant: the daughter, as chattel property, could not agree to be sexually used by another person in a way that conflicted with her father's property right. Once a seduced woman could sue her former lover on her own behalf, however, her willing participation in the illicit sexual relationship arguably should have barred any recovery, no matter how deceitful the conditions of her consent or injurious the consequences of the relationship.

By giving women a cause of action, the new seduction statutes provided [*387] that a woman's agreement to sexual intercourse did not bar later recovery, so long as her consent had been coerced either through force or fraud. In contrast, under the common law in the states that never codified the seduction tort, the seduced woman was not recognized as a proper plaintiff until well into the twentieth century. n48 The common law rule regarded such women as being in pari delicto, and hence unworthy plaintiffs: Having consented to the nonmarital sexual intercourse of which she complained, the seduced woman was held culpable for her own sexual ruin. n49 This attitude that "she made her bed, let her lie in it" persists into the present day as a subtext of arguments against affording a legal remedy to women deceived into sex. n50

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n48 See, e.g., Breece v. Jett, 556 S.W.2d 696, 705 (Mo. Ct. App. 1977) (extending common-law right of recovery to seduced female plaintiff based on state "real party in interest" statute); Slawek v. Stroh, 215 N.W.2d 9, 18 (Wis. 1974) (same, relying on state constitutional provision providing remedy for every injury or wrong).

n49 See Sinclair, supra note 28, at 49, 51-52; see also Hamilton v. Lomax, 26 Barb. 615, 617 (N.Y. Sup. Ct. 1858) (holding that seduced woman cannot "maintain an action for such seduction, because the person seduced assents thereto").

n50 See infra notes 126-130 and accompanying.

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Once a seduced woman was allowed to sue on her own behalf, the circumstances of her sexual consent became the most contested factual issue in the dispute. She was required to prove that her apparently willing consent to sexual relations had been compromised by the defendant's wrongdoing. Reformulated as a moral injury to the seduced woman herself, the paradigmatic seduction case evolved into a claim of fraud: By means of an intentional deception, the seduced woman had yielded a valuable interest -- her consent -- only in reliance on "deception, enticement, or other artifice." n51 Pregnancy -- a critical element of the tort when economic loss of services had been the gravamen of the cause of action -- now brought only an additional measure of damages. The wrong remedied by the tort was the woman's loss of sexual chastity per se, and the courts presumed that a sexually active woman had no virtue to lose. n52 In the latter part of the nineteenth century, the plaintiff's prior virtue and spotless sexual reputation thus became critically important to a successful seduction claim. n53

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n51 Hutchins v. Day, 153 S.E.2d 132, 134 (N.C. 1967).

n52 To be a "chaste woman" for purposes of a seduction claim did not necessarily mean being a physically intact virgin female. It was the common-law rule that any unmarried woman, including a divorced woman or a widow, could sue for seduction. See Amburgey v. Commonwealth, 415 S.W.2d 103, 105 (Ky. 1967). Even a woman who at one time had been sexually active could sue for seduction if "'the evidence shows her to [have been] a chaste woman for a reasonable time immediately before such intercourse.'" Id. at 105 (quoting Hoskins v. Commonwealth, 221 S.W. 230, 232 (Ky. 1920)); accord Breece, 556 S.W.2d at 708 (allowing suit for seduction by 30-year-old divorced mother).

n53 Under the modern claim of sexual fraud, a plaintiff's chastity is not a standing requirement. The theory of the modern cause of action is that there is a legally protectable interest in bodily integrity and sexual autonomy that is invaded by nonconsensual sex. See infra notes 125-126 and accompanying text.

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[*388] 2. Sexual Restraint and the Protection of Women. -- Cast as a story about the "wronged female innocent" and the "male sexual brute," the nineteenth-century seduction action mirrored the sexual ideology of the surrounding culture. Victorian culture exalted sexual restraint and designated women as caretakers of society's sexual virtue. n54 Women's responsibility for stopping sex was central to the "separate spheres" ideology, which confined women to a distinct world focused on children, husbands, family dependents, and church, and defined the female nature as embodying the domestic virtues of patience, emotion, tenderness, nurturance, morality, and sexual purity. n55 In accordance with this separate spheres ideal, women were held to be "naturally modest" and for the most part without sexual desire. n56 By contrast, men were

portrayed as "sexual brutes," obsessed with sex and disposed to use their legal and social authority as husbands, fathers, and employers to exploit "the female's trusting and affectionate nature." n57 Although Victorians accepted male sexual excess as pervasive and perhaps ultimately impossible to suppress, both men and women nonetheless regarded it as a moral failing. n58

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n54 By the 1850s, limiting sexual activity to legal marriage and for reproductive purposes only had become the dominant cultural ideal in Victorian societies. Feminists, "sex radicals," and conservative moralists agreed that sexual excess was to be feared, and they all also exalted moderation both in sexual feeling and conduct. See Christina Simmons, Modern Sexuality and the Myth of Victorian Repression, in Passion and Power: Sexuality in History 157, 158-59 (Kathy Peiss & Christina Simmons eds., 1989).

n55 See Linda K. Kerber, Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History, 75 J. Am. Hist. 9, 10 (1988). The separate spheres ideology largely applied to white, middle-class, heterosexual women. Although society measured women outside this category against these feminine ideals of sexual purity and domesticity (often to their detriment), more marginalized women were rarely accorded the moral authority and social respect which the separate spheres ideology implied that all women deserved. See, e.g., Elizabeth Fox-Genovese, Within the Plantation Household: Black and White Women of the Old South 192-241 (1988) (describing gulf between slaveholding and enslaved women in the antebellum American South); Jacqueline Jones, Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present 1-151 (1985) (comparing experience of free and enslaved black women in southern United States).

n56 Victorian medical and moral experts claimed that the sexual drive of women was weaker than that of men, although not altogether absent. See Simmons, supra note 54, at 158-59; Sondra R. Herman, Loving Courtship or the Marriage Market? The Ideal and Its Critics, 1871-1911, 25 Am. Q. 235, 239 (1973).

n57 Carroll Smith-Rosenberg, Disorderly Conduct: Visions of Gender in Victorian America 106, 116 (1985) [hereinafter Smith-Rosenberg, Disorderly Conduct]; see also Herman, supra note 56, at 239 (arguing that Victorian doctors and clergymen "[a]ssum[ed] that man's 'animal nature' was much stronger than woman's . . ., [and] issued stern warnings about the average masculine morality").

n58 See Carrol Smith-Rosenberg, Sex as Symbol in Victorian Purity: An Ethnohistorical Analysis of Jacksonian America, in Turning Points: Historical and Sociological Essays on the Family S212, S215-S221 (John Demos & Sarane Spence Boocock eds., 1983) (arguing that young men's sexuality symbolized to Victorians the breakdown of traditional patriarchal family and social authority). Many Victorian-era men shared the ideal of sexual restraint and were fearful of male sexual excess. See Charles Rosenberg, Sexuality, Class and Role in Nineteenth-Century America, 25 Am. Q. 131, 139-41 (May 1973) (describing ideal of continent and reserved "Christian Gentleman").

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[*389] Of course, this Victorian idealization of sexual restraint did not translate into actual behavior. Nineteenth-century America was characterized by high rates of abortion, premarital pregnancy, venereal disease, and prostitution -- all indications that sexual behavior was far more varied and active than the prevailing sexual ideology would lead us to believe. n59 The letters exchanged during this period by courting and married couples, for example, reveal that women in love were often candid about their sexual desire and eager to engage in sexual intimacies. n60 In a survey conducted by Dr. Clelia D. Mosher of the sexual behavior and values of a group of married, white, middle-class women born in the late Victorian period, more than eighty percent reported achieving orgasm during sexual intercourse with their husbands, a figure that belies the sexless image of the Victorian wife. n61 Rather than actual sexual practice, the Victorian ideology of sexual restraint reflected moral aspirations regarding freedom and order, masculinity and femininity, as well as anxiety about the evident gap between those ideals and reality.

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n59 Although such diverse sexual activity was publicly disapproved, other social indicia manifest an implicit understanding and acceptance that illicit sexual activity was commonplace. Erotic literature and pornography, as well as dance halls and burlesque and strip shows, were common, as was prostitution. See D'Emilio & Freedman, supra note 30, at 130-38. The rate of premarital sex was high, see supra note 39, and contraceptives, abortifacients, and abortion providers were widely advertised in the popular press. See James C. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900, at 47, 67-68 (1978). Advocates of alternative sexual moralities, such as the free love movement, openly advocated their case in public arenas. See D'Emilio & Freedman, supra note 30, at 112-21. Same-sex love relationships were evident among men -- particularly in the military, working-men's boardinghouses, and prisons -- and among women in boarding schools, colleges and women's reform societies. See id. at 123-30; see also Smith-Rosenberg, Disorderly Conduct, supra note 57, at 53 (1985) (discussing social tolerance for intense romantic relationships between middle-class women).

n60 See Karen Lystra, Searching the Heart: Women, Men, and Romantic Love in Nineteenth-Century America 56-87 (1989). Equally strong, however, was the sense that desire was a deeply private matter between lovers, and that the act of sexual intercourse should be reserved for marriage. See id. at 50-59.

n61 See Carl N. Degler, What Ought to Be and What Was: Women's Sexuality in the Nineteenth Century, in The American Family in Social-Historical Perspective 403, 416-17 (Michael Gordon ed. 2d ed. 1978). Rosalind Rosenberg agrees with Degler's general conclusion, but she also emphasizes the ambivalent feelings about sexuality expressed by respondents in the Mosher survey, most of whom would have preferred less frequent sex and more control over its reproductive consequences. See Rosalind Rosenberg, Beyond Separate Spheres: Intellectual Roots of Modern Feminism 179-86 (1982).

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Although the Victorian convention of female sexual modesty repressed women's sexuality, it also strengthened women's social authority and dignity, empowering women to resist male sexual demands and [*390] thus shifting the balance of power between men and women in the private sphere. Pointing to dramatically

declining birth rates throughout the nineteenth century, historian Carl Degler concludes that both married and single women in the Victorian period were able to limit sexual relations to a much greater degree than were women in any earlier historical period in the United States. n62 Modesty thus functioned as a limited form of female regulatory power over male sexual conduct. n63 Yet the conventions of female sexual modesty protected "respectable" women only at the expense of prostitutes, enslaved women, and domestic servants, against whom male sexual interest was redirected. n64

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n62 See Carl N. Degler, At Odds: Women and the Family in America from the Revolution to the Present 9, 180-83 (1980).

n63 See Nancy F. Cott, Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850, 4 Signs 219, 233 (1978) (suggesting that "passionlessness" gave Victorian women "a way to assert control in the sexual arena").

n64 Although Victorian culture prized the ideal of female modesty and male restraint, it tolerated in practice a double standard under which men routinely engaged in illicit sexual activity with little social penalty. See D'Emilio & Freedman, supra note 30, at 132-38; supra note 59.

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The ideal of sexual restraint also served as a key source of public power for women in the Victorian period. Degler argues that women's growing political influence throughout the nineteenth century was made possible by an increased measure of female sexual control in private relationships. n65 Nineteenth-century women could neither vote nor hold public office. Yet by the 1820s, organizations of middle- and upper-class women had formed to seek legal and social reform on a range of controversial issues, including expansion of the laws to protect women from seduction and other forms of sexual exploitation. n66 These female reform groups anticipated modern feminism in their open criticism of men's sexual privileges, their characterization of men's private sexual conduct as a problem of public dimension, n67 and their vision of female solidarity. n68 The reformers saw a sexual act procured by force [*391] or fraud as a violation not only of the victim's bodily integrity and social reputation, but also of her personhood. "Women have so long been called 'angels' that men seem to have come to the conclusion that they have no persons to protect," proclaimed an 1846 publication of the influential American Female Moral Reform Society. n69

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n65 See Degler, supra note 62, at 279-98.

n66 See D'Emilio & Freedman, supra note 30, at 142 (stating that "middle-class women emerged as a powerful interest group committed to the guardianship of the nation's morals and critical of the sexual privileges enjoyed by men").

n67 In a broad critique of men's sexual power, women's reform groups linked their critique of seduction to the issue of prostitution: Female moral reformers analyzed prostitution as an expression of male dominance in economic,

political, social, and family life, and they viewed the sexual double standard expressed by the flourishing of the prostitution trade as an expression of this imbalance of power between the sexes. See Barbara Meil Hobson, Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition 49-76 (1987). The prostitute was depicted not as a moral failure or a criminal, but rather as a victim forced into the trade by sexual exploitation. See Estelle B. Freedman, Their Sisters' Keepers: Women's Prison Reform in America, 1830-1930, at 33 (1981).

n68 Historian Carroll Smith-Rosenberg points out that the women's moral reform societies sought not only to curtail male sexual authority and abuses of power but also to create new emotional and communal ties between women otherwise isolated in frontier rural or industrializing urban settings. See Smith-Rosenberg, Disorderly Conduct, supra note 57, at 119-21 (1985).

n69 American Female Moral Reform Society, Advocate of Moral Reform 49 (1846), quoted in Barbara J. Berg, The Remembered Gate: Origins of American Feminism 209 (1978).

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For this earlier generation of feminists, the lack of effective legal remedies for sexual abuse and exploitation attested to women's degradation in society and their powerlessness to control their own lives. Feminist reformers were instrumental in the passage of the reform seduction statutes in the states, and the pattern of reforms reflected women's outrage about the legal restrictions on common-law recovery for seduction. As reformer Lydia Maria Child angrily wrote:

"[A] woman must acknowledge herself the servant of somebody, who may claim wages for her lost time! . . . It is a standing insult to womankind; and had we not become the slaves we are deemed in law, we should rise en masse . . . and sweep the contemptible insult from the statute-book." n70

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n70 American Female Moral Reform Society, Advocate of Moral Reform 41 (1844), quoted in Berg, supra note 69, at 210. Child and other members of the American Female Moral Reform Society also supported the enactment of laws criminalizing seduction. See Berg, supra note 69, at 212.

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A decade before the movement for suffrage emerged in the 1840s, women's moral reform societies began to wage influential petition campaigns to persuade state legislators to enact legal penalties for seduction. n71 Women collected thousands of signatures and gained the support of powerful male reformers, and the campaigns succeeded in winning passage of anti-seduction laws in New York and Massachusetts, and in introducing legislation in Ohio. n72 Buoyed by these early victories, the move to enact laws against seduction spread to other states. n73

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n71 See D'Emilio & Freedman, supra note 30, at 145; see also Backhouse, Petticoats and Prejudice, supra note 31, at 70 (describing parallel anti-seduction campaigns in Canada in same period). The liberalization of seduction through statute has also been attributed more generally to the rise of the middle class and the increasing dominance of their interests in politics and culture. Melville M. Bigelow, The Law of Torts 267-68 (8th ed. 1907). Certainly the female moral reform movement was aggressively middle-class in character. D'Emilio & Freedman, supra note 30, at 142.

n72 See Berg, supra note 69, at 212-13; D'Emilio & Freedman, supra note 30, at 145; Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 47-48 (1985); Mohr, supra note 59, at 121-22.

n73 See supra notes 41-46 and accompanying text. In their nationally distributed monthly journal, Advocate of Moral Reform, the American Female Moral Reform Society urged women to "pour in petitions to the Several State Legislatures." Advocate of Moral Reform 176 (1841), quoted in Berg, supra note 69, at 211. The Advocate repeatedly published model petitions to legislatures for use by local members. See id.

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[*392] Alongside these public campaigns for sexual reform, Victorian-era Americans reaffirmed sexual modesty as a familial and personal ideal for women. In its most dour aspect, Victorian society enforced female modesty by harshly castigating immodest women, particularly unmarried women who became pregnant. As the popular genre of seduction novels warned, an unmarried pregnancy meant social disgrace for a woman. n74 Victorian popular culture dramatized the perils of sexual adventure for women, dangers exemplified by the lurid media coverage of Jack the Ripper's sexual murders in England. n75 Stressing female helplessness before male sexual violence and abuse, reports of child prostitution and the "white slave trade" also became media staples of the era. n76 These representations of women as sexual victims further justified limits on women's independence and repression of their sexuality. On the other hand, these terrible threats were sweetened with alluring promises that sexual modesty was the key to a happy and advantageous marriage. n77 A modest girl's shyness and innocence were her excuses for sexual delay, allowing her a leisurely period of courtship during which she could observe her lover and judge his qualities as a future husband. n78 Female sexual modesty came to represent a strategic advantage in the competitive "marriage market." According to the conventional wisdom of Victorian advice manuals, men might dally with permissive women, but they married only modest ones. n79 Both by threats and incentives, sexual modesty was thus inculcated in young women to protect them against the genuine threat that sexuality presented to their future welfare.

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n74 See Welter, supra note 13, at 155.

n75 See Judith R. Walkowitz, City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London 191-228 (1992).

n76 See id. at 81-134.

n77 See Ruth B. Yeazell, Fictions of Modesty: Women and Courtship in the English Novel 33 (1991) (characterizing female modesty as inseparable from Victorian ideal of marital happiness). Marriage was the most important determinant of Victorian women's life chances, and choosing a good husband was a decision of great importance for young women and their families. See Sara M. Evans, Born for Liberty: A History of Women in America 69-70 (1989). The emotional anxiety surrounding courtship and marriage spawned a prolific genre of advice manuals during the Victorian period. See Herman, supra note 56, at 235.

n78 See Yeazell, supra note 77, at 41-42.

n79 See id. at 45-46; see also Herman, supra note 56, at 237-40 (discussing late 19th-century doctors and clergymen's advocacy of reasonable love over passion in popular advice manuals).

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The attempt to control men by imposing on women attitudes of sexual innocence, however, exposed deep cultural tensions regarding women's sexuality. n80 Beneath the ideal of female sexual modesty lay [*393] the fear that women were perhaps not so innocent after all. For many, the suspicion remained that women might use their power to say "no" for manipulative ends. In many Victorian minds, women's weaker sex drive gave them an unfair advantage over men. "When a man sought a girl[,] he was following a powerful instinct. The girl, on the other hand, could judge a suitor more rationally . . .[,] coldly evaluating prospective husbands in terms of earning power." n81 Even as Victorian sexual ideology gave women limited authority to restrain male sexuality, it aroused the persistent suspicion that women would strategically abuse that power to sexually dominate men. Victorian women might thus use the ideology of sexual restraint against itself -- as a springboard for significant private and public power and a threatening challenge to male dominance.

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n80 In the first instance, a logical contradiction lay underneath the social roles envisioned by the female modesty-male excess sexual construct. Women could not at the same time remain sexually innocent and yet possess enough sexual knowledge to protect themselves from seduction. "Can anything be more absurd than keeping women in a state of ignorance, and yet so vehemently to insist on their resisting temptation?" asked early feminist and sexual rebel Mary Wollstonecraft. Mary Wollstonecraft, A Vindication of the Rights of Woman 232 (Mariam Brady ed., Penguin Books 1985) (1792).

n81 Herman, supra note 56, at 239-40.

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3. Sexual Freedom and the Anti-Heartbalm Movement. -- By the early decades of the twentieth century, these tensions within the ideal of sexual restraint had begun to turn public opinion against the tort of seduction. To make their claims of exploitation believable, nineteenth century seduction plaintiffs had relied heavily on images of male sexual aggressiveness and female sexual vulnerability. But as women's personal, social, and economic autonomy continued to grow, n82 the dynamics of seduction cases changed: women brought suit as sexually active agents of their own interests. Seduction cases consequently

began to be regarded much as rape and sexual harassment cases are today, with popular debate dominated by speculation that the female complainants were lying. In the early twentieth century, the condemnation of male sexual aggression that had shaped earlier public opinion began to wane, and male defendants were increasingly perceived as innocent targets of scheming and hypocritical blackmailers. n83

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n82 In 1920, American women won the vote. Evans, supra note 77, at 172. In the latter part of the nineteenth century, new jobs opened up for women (as typist/stenographers, department-store sales clerks, etc.), making employment for the first time an economically feasible life option for a single woman. See Sheila M. Rothman, Woman's Proper Place: A History of Changing Ideals and Practices, 1870 to the Present, 42-60 (1978).

n83 Newspapers blamed a class of "unscrupulous jackleg lawyers" for conspiring with blackmailing plaintiffs to bring meritless suits. See Sinclair, supra note 28, at 89 (quoting Indianapolis News, Mar. 8, 1935, at 1). Another commentator sneered: "Decent lawyers do not accept suits of this type." Id. (quoting Talcott Powell, A Merit System, Indianapolis Times, Feb. 18, 1935, at 6).

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At the same time, a new generation of female reformers came to equate the seduction action with antiquated sexual values threatening to the interests of emancipated women and men. n84 The convergence of this attitudinal shift with changes in popular opinion sparked a new [*394] phase in the history of the seduction tort. Beginning in 1935, about a third of the states enacted laws to abolish seduction and the related common law sexual torts, in legislation known as "anti-heartbalm" statutes. n85

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n84 See infra note 95.

n85 See Sinclair, supra note 28, at 66-67, 71. "Heartbalm" was a derogatory term referring to the common law sexual torts of seduction, breach of promise to marry, criminal conversation and alienation of affections. See Nathan P. Feinsinger, Legislative Attack on "Heart Balm," 33 Mich. L. Rev. 979, 979 (1935). Although the four causes of action were grouped together under the "heartbalm" label, the underlying theory of liability for each is distinct. Apparently, what linked the four torts in the mind of commentators was their common focus on sexual misconduct. See id. at 1009.

The anti-heartbalm movement was not primarily directed at the seduction tort, but rather at the action for breach of promise to marry. See Sinclair, supra note 28, at 67; Legislation, Abolition of Actions for Breach of Promise, Alienation of Affections, Criminal Conversation and Seduction, 5 Brook. L. Rev. 196, 197 (1936). Seduction seems to have been swept up in a campaign of propaganda directed broadside against "heartbalm" and "sexual racketeering" that blinded reformers to differences among the common law sexual torts. See Frederick L. Kane, Heart Balm and Public Policy, 5 Fordham L. Rev. 63, 65-66 (1936) (discussing distortions created by terms such as "heartbalm" and

"racket" in anti-heartbalm debate). The popular campaign against "heartbalm" began only after more than a decade of harsh academic criticism, which concentrated on the breach-of-promise-to-marry action. Academic lawyers were troubled by the hybrid nature of the action (which mingled elements of contract, tort, and family law), the lack of control over jury awards resulting in widely varying and allegedly excessive damages, and the suspicion that extortion was possible. See, e.g., James Schouler, A Treatise on the Law of Marriage, Divorce, Separation, and Domestic Relations @ 1302 (6th ed. 1921); Chester G. Vernier, 1 American Family Laws @ 6 (1931); Edwin W. Hadley, Breach of Promise to Marry, 2 Notre Dame Law. 190, 193-94 (1927); Harter F. Wright, The Action for Breach of the Marriage Promise, 10 Va. L. Rev. 361, 361 (1924). It appears that critics eventually turned to the legislatures after despairing of what was perceived as the irrationality of judges and juries. See Grossberg, supra note 72, at 62.

It also bears noting that several states enacted anti-heartbalm statutes that abolished alienation of affections, criminal conversation, and breach of promise to marry, while leaving intact the common law remedy for seduction. See, e.g., 1935 Ill. Laws 716 (codified at Ill. Ann. Stat. ch. 40, para. 1901-1907 (Smith-Hurd 1980)); 1935 Pa. Laws 450 (codified at Pa. Stat. Ann. tit. 48, @@ 170-177 (1965) (repealed 1990)). Decades later, however, the Illinois statute was interpreted as implicitly abolishing seduction. See Smith v. Hill, 147 N.E.2d 877, 878-79 (Ill. 1958).

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The greater sexual openness of the Progressive and New Deal eras in the United States intensified men's fears that they could be manipulated by women's power to grant or deny sexual favors. In the popular culture of the period, women were portrayed as dominating men sexually through their power to say "no" -- tricking men into marriage by conditioning consent to sex upon promises of engagement, and once married, withholding sex to extort money and other privileges from their husbands. n86 Common stereotypes were those of the "gold digger," who married for money, and the "seductress," who lured wealthy men into sexual liaisons and then threatened them with lawsuits aimed [*395] at extorting hefty settlements. n87 Supporters of the anti-heartbalm reform movement put forward three major arguments: first, that seduction and the other heartbalm actions were tools for blackmail in the hands of undeserving women; second, that even in a genuine claim for seduction, an award of money damages could neither reverse the loss of physical virginity nor mend emotional injury; and finally, that the public airing of an illicit sexual relationship was itself evidence of the complaining woman's lack of modesty and morality, exposing her as an unworthy plaintiff. n88 According to the New York Times, the author of the New York anti-heartbalm bill declared that the legislation would end the "tribute of $ 10,000,000 paid annually by New York men to gold-diggers and blackmailers. Nine out of ten . . . suits have been of the racketeer type." n89 In enacting anti-heartbalm legislation, some states cast the bills as measures for the improvement of public morality; some even made it a crime to raise a legal claim for seduction. n90 Legislators were outraged that a sexually active woman could exploit conventional morality for her own profit. n91 Yet this focus on so-called "bad girls" [*396] who allegedly misused the law removed from public concern the experiences of countless other women, who remained trapped between the contradictory pressures of male sexual aggression and social condemnation of nonmarital sexuality. n92

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n86 See Simmons, supra note 54, at 165.

n87 See id.; see also Fannie Hurst, Back Street 54, 92-102 (1931) (fictional account of woman's use of pregnancy scare to force lover into marriage); Alice Beal Parson, Man-Made Illusions About Woman, in Woman's Coming of Age: A Symposium 20, 20-23 (Samuel D. Schmalhausen & V.F. Calverton eds., 1931) (detailing exploitation of husbands by married women); Winifred Raushenbush, The Idiot God Fashion, in Women's Coming of Age, supra, at 424, 443 (same).

n88 See, e.g., Feinsinger, supra note 85, at 997-1008. The preamble of the New York anti-heartbalm statute, enacted in 1939, read:

The remedies . . . having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies.
N.Y. Civ. Practice Act @ 61-a (Thompson 1939). The unworthy plaintiff argument mirrored the in pari delicto label imposed on earlier female plaintiffs seeking to sue in their own names. See supra notes 48-50 and accompanying text.

n89 Ban on Heart Balm Is Made State Law, N.Y. Times, Mar. 30, 1935, at 3.

n90 These statutes made it a misdemeanor or a felony to file, to threaten to file, or to induce a settlement of heartbalm claims, and declare void any agreement to settle such claims. See, e.g., Md. Fam. Law Code Ann. @@ 3-104, 3-105 (1984). In Illinois, the state supreme court held that such a statute violated a state constitutional provision guaranteeing a remedy for every wrong. See Heck v. Schupp, 68 N.E.2d 464 (Ill. 1946).

n91 No modern scholar has sought to substantiate the reformers' vehement claims that a "cottage industry" of plaintiff's lawyers and false claimants were systematically bringing blackmail suits based on heartbalm claims. It is thus not possible to determine whether or how frequently women brought unmerited claims of seduction based on the motives of greed and revenge attributed to them by critics. "As in so much of the agitation over family law," historian Michael Grossberg writes of the anti-heartbalm movement, "perception and prejudice, not empirical reality, most influenced the law." Grossberg, supra note 72, at 55. It is notable, however, that before 1930 only two reported seduction cases in the U.S. mentioned the possibility of blackmail or extortion. See Young v. Corrigan, 208 F. 431, 437 (N.D. Ohio 1912); Morgan v. Yarborough, 5 La. Ann. 316, 323 (1850). The courts apparently saw no pressing need to abolish the common law sexual torts.

Nevertheless, it is clear that unproven assumptions about sexual blackmail came to dominate public opinion once the anti-heartbalm movement gained momentum. Newspapers and legislators opposed to the heartbalm actions failed to document their sweeping accusations of blackmail, and more fair-minded critics admitted that abuses in some subset of cases had been wrongfully attributed to

an entire category of legal remedies. "[N]ewspaper emphasis has created an illusion of universality as to the evils of unfounded actions, coercive settlements or excessive verdicts which concededly exist in particular cases." Feinsinger, supra note 85,at 1008-09; accord Kane, supra note 85, at 66 ("Unquestionably there was some justification for the resentment over the abuse of the remedy of breach of promise to marry, but we may seriously doubt whether these abuses were as universal or as ineradicable as to necessitate the wholesale abolition of established rights and remedies."). Often critics thought it enough to discredit a claim simply to point out that the female heartbalm plaintiff was a single woman suing a much wealthier and older man. The breach-of-promise action was characterized by one commentator as "available only to a few aggressive women whose connivance or good fortune has procured them pledges from men who can pay." Anthony M. Turano, Breach of Promise: Still a Racket, 32 Am. Mercury 40, 46 (1934). In deriding a breach-of-promise claim brought by a secretary against her boss, the sponsor of the New York anti-heartbalm bill asserted that "[a]ny girl intelligent and self-respecting enough to make her own way in the world might have been expected to smell a rat long before the boss broke the bad news." Sinclair, supra note 28, at 92 (quoting Indianapolis Times, Mar. 4, 1935, at 6). Although male defendants were consistently portrayed as the "innocent victim[s]" of manipulative female liars and their lawyers, as in the preamble to the New York anti-heartbalm statute, see supra note 88, it was rarely denied that defendants were sexually involved with complainants, an implicit admission that some aspects of these claims were true.

Other than the threat of embarrassing publicity, nothing about the nature of a seduction suit lends itself to blackmail to a greater degree than any other tort claim. The argument that plaintiffs are more likely to lie about sex than about other matters draws heavily on unfounded bias against women as sexual accusers. See infra notes 305-313 and accompanying text. One commentator of the period conceded that the only reason for singling out the common law sexual torts for abolition -- when other tort actions for intentional injury to emotional or relational interests remained intact -- is because of their sexual nature, "by reason of which emotion and moral indignation prevail." Feinsinger, supra note 85, at 1009.

n92 As societal derision of the common law sexual torts increased and the social costs of bringing a claim began to surpass the benefits of compensation for injury, women brought many fewer actions for seduction, see Sinclair, supra note 28, at 65, and for breach of promise to marry, see Grossberg, supra note 72, at 63. See also Rosemary J. Coombe, "The Most Disgusting, Disgraceful and Inequitous Proceeding in Our Law": The Action for Breach of Promise of Marriage in Nineteenth-Century Ontario, 38 U. Toronto L.J. 64, 98 (1988) (noting that anti-heartbalm exponents "placed so much emphasis on the absurdity of giving money to women to compensate them for wounded feelings . . . that the real social and economic injuries suffered by women were obscured").

On balance, the anti-heartbalm movement was by no means uniformly successful. Although the reform idea caught on quickly, with similar bills introduced in 23 state legislatures within one year of introduction of the first bill in Indiana, most states ultimately failed to enact the legislation. Of the 23 state legislatures that considered the anti-heartbalm issue in 1935, only eight passed anti-heartbalm legislation before 1950. See Sinclair, supra note 28, at 82-84.

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[*397] Although latently misogynistic rhetoric fueled the anti-heartbalm reform, in several states women lawmakers actually initiated the legislative movement to abolish these torts. n93 The anti-heartbalm movement was begun by Roberta West Nicholson, the sole female member of the Indiana legislature and a strong advocate of women's rights. n94 In her speech before the final vote on the anti-heartbalm bill in Indiana, West declared: "Women do not demand rights, gentlemen, they earn them, and they ask no such privileges as these which are abolished in this bill." n95 Like Nicholson, feminists generally played down the women's rights element of the anti-heartbalm movement by casting the reform as eliminating unfair favoritism toward women from the law, but the underlying feminist agenda remained strong. n96 Female reformers of the Progressive and New Deal eras increasingly saw sexual independence as a symbol of freedom from the past. n97

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n93 The first successful anti-heartbalm bill was introduced in 1935 by Rep. Roberta West Nicholson of Indiana. See Sinclair, supra note 28, at 66. Reps. Blanche E. Hower and Alma Smith introduced separate bills in Ohio that same year, see id. at 66 & nn.246-47, but Ohio did not enact such legislation until 1978; see Ohio Rev. Code Ann. @ 2305.29 (Baldwin 1992). Bills in Maryland and Nebraska were also introduced by women. See Sinclair, supra note 28, at 82 n.368 (Maryland); Feinsinger, supra note 85, at 997 (Nebraska).

n94 See Sinclair, supra note 28, at 66, 90.

n95 Indianapolis News, Feb. 2, 1935, at 3. Opposition to the anti-heartbalm legislation came from socially conservative male legislators who believed women lacked the sexual independence, good judgment, and strength of character to hold their own in the sexual world. See Sinclair, supra note 28, at 90-91.

n96 See Sinclair, supra note 28, at 92.

n97 The drive for women's political power represented by Victorian feminism was replaced in the early twentieth century by a drive for sexual liberation, "the right to sexual experimentation and self-expression." Smith-Rosenberg, Disorderly Conduct, supra note 57, at 284. Smith-Rosenberg argues that "[s]exuality was the critical issue for this generation of New Women," who "linked it with identity and with freedom." Id. at 245, 292.

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These feminists came to oppose the heartbalm actions as antithetical to "modern" values of female emancipation, sexual liberation, and companionate marriage. n98 As framed by Victorian-era litigants, the seduction tort assumed that women were by nature sexually passive and had sex only because men pressured them. Furthermore, the seduced woman's claim was that nonmarital sex had destroyed her self-respect, her reputation in the community, and her chances to marry. These claims of injury rested on the premise that women were dependent on men and marriage for economic support and social identity. n99 Such [*398] images of economically trapped and sexually passive women undercut the social equality, sexual freedom, and economic independence for which this new generation of feminists was striving. To these women, abolition of the

seduction cause of action came to represent an important symbolic victory, striking a blow against the Victorian vision of women as men's property and replacing that vision with the ideal of a newly emancipated woman. n100

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n98 See Simmons supra note 54, at 159-60.

n99 See supra notes 27-38 and accompanying text.

n100 See Coombs, supra note 35, at 13-14. Coombs finds fault with the women's rights advocates who played a leading role in the anti-heartbalm movement. She argues that a combination of social idealism and economic privilege limited early feminists' ability to sympathize with more economically dependent, sexually vulnerable women on whom the female emancipation movement had as yet had little impact. See id. at 15-17.

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The curious tension between misogynistic backlash and feminist idealism in the anti-heartbalm movement reflected changes in background cultural values concerning sexuality. Reformers of the 1920s and 1930s proclaimed a "Sexual Revolution" and rejected the rigidity of Victorian sexual mores. n101 Painting a negative picture of nineteenth-century sexual repression, they advanced a new vision of unconstrained sexuality, and of female sexual responsiveness in particular. n102 Women as well as men possessed sexual natures, they asserted, n103 and human sexuality was a natural and positive force whose full expression was integral to the health of individuals and of society. n104 Victorian efforts at [*399] sexual control were condemned as both harmful and futile, n105 because sexuality would break all bonds imposed by law or social convention. n106 In the 1920s and 1930s, the ideas of these reformers helped to generate a new set of sexual conventions, replacing the ideal of female sexual restraint with an equally powerful expectation of female sexual availability. Sexual expression became the prevailing model of individual and social well-being. The vanguard of the rebellion put forward the young, hedonistic, and sexually permissive "Flapper" as a defiant new image of womanhood. n107

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n101 See Margaret Sanger, Happiness in Marriage 21, 48 (1926) (counselling both women and men to "[n]ever be ashamed of passion"). Predominantly white and middle-class, the sexual reformers of the 1920s were an elite group of intellectuals, writers, physicians, and mental health professionals. See Simmons, supra note 54, at 157-58. Both men and women were involved in the public articulation of the Sexual Revolution of the 1920s. See id. at 160-61.

Some evidence suggests that the so-called Sexual Revolution of the 1920s in fact began among the poorer and working classes as early as the late nineteenth century. See Daniel S. Smith, The Dating of the American Sexual Revolution: Evidence and Interpretation, in The American Family in Social-Historical Perspective supra note 61, at 426, 432-33. Citing studies of rates of illegitimate pregnancy, Smith suggests that premarital intercourse was at least twice as prevalent among the general population in the late nineteenth century as it was within the well-educated middle class. See id. There is, however, no evidence that these changes in working class sexual behavior were accompanied

by the corresponding shifts in attitudes towards sexual relations and male/female sexuality that made the middle-class "Sexual Revolution" of the 1920s a cultural turning point.

n102 See Simmons, supra note 54, at 158-59.

n103 In the early twentieth century, the sexual aspect of romantic love was accommodated in the ideal of companionate marriage, a union that held out romance, friendship, and sexual passion within a devoted partnership. See Ben B. Lindsay & Wainwright Evans, Companionate Marriage 175 (1927) (defending legalization of contraception in companionate marriage -- "a state of lawful wedlock, entered into for love, companionship, and cooperation by persons who . . . are not prepared at the time of their marriage to undertake the care of a family"). This expectation of genuine marital intimacy and partnership demanded greater equality between husband and wife, but more importantly, a recognition of women's capacity for desire and sexual pleasure.

n104 See D'Emilio & Freedman, supra note 30, at 223-26, 233-35.

n105 See Simmons, supra note 54, at 161.

n106 Americans cited the then-radical ideas of scientists and thinkers like Sigmund Freud and Havelock Ellis as important evidence that sexual desire was irrepressible, that sexuality was a central and constitutive force of human personality, and that cultural values about sexual conduct were profoundly important in shaping human civilization. See D'Emilio & Freedman, supra note 30, at 223-26. Because these ideas are part of our received cultural heritage, it is easy to forget that they are as historically specific and culturally bound as were the Victorian ideals of sexual restraint and excess.

n107 See Evans, supra note 77, at 175-79. See generally Paula S. Fass, The Damned and the Beautiful: American Youth in the 1920's, 260-90 (1977) (presenting comprehensive account of challenge to traditional sexual mores in the 1920s). For all her image of sexual self-determination and nonchalance, the Flapper continued to contend with more traditional ideas about women. The sexual double standard persisted into the twentieth century, stigmatizing girls who "permitted liberties." See D'Emilio & Freedman, supra note 30, at 262. Like more traditional women, the Flapper's aspirations in life remained focused on love, romance, and marriage. Although young women in the 1920s were far more likely to engage in premarital intercourse than women born in preceding decades, an individual woman generally restricted intercourse to a single male partner whom she expected to marry. See id. at 257. Once married, the Modern Girl tended to retreat, like women of earlier generations, from the dance hall into the household. See Evans, supra note 77, at 177-79. Yet the rise of this ideology of personal liberty cast the political feminism of the Victorian period in an unflattering light as old-fashioned or anti-sex: "Only the 'unnatural' woman continued to struggle with men for economic independence and political power." Smith-Rosenberg, Disorderly Conduct, supra note 57, at 283. Despite the new emphasis on hedonism and lifestyle in the 1920s, older images of women as the nurturing caretakers of society remained important for women. In the first decades of the century, women were active in the peace movement, in continuing efforts at social welfare reform (particularly on behalf of women's and children's health), and in activism around issues of women's working conditions. See Evans, supra note 77, at 188-189, 191-94. But as the nation's political climate turned increasingly conservative and hostile to the Progressive reform

tradition, women's political activism -- even in this domestic form -- came to be ridiculed as unwomanly. See id. at 194.

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This outburst of concern for personal liberty has continued to shape American sexual and legal culture to the present, reaching a second peak of influence in the 1960s and 1970s. n108 Female sexual responsiveness continues to be accepted as normal and even desirable, and there is markedly greater social tolerance for nonmarital sexual intimacy. More effective and accessible means of contraception and abortion have dramatically lessened the risks of sexual activity for women. [*400] A libertarian sexual ideology has energized efforts to strike down state laws criminalizing "deviant" sexual acts and nonmarital sexual relationships. With the exception of laws directed at gay and lesbian sexual conduct, many of these laws were repealed in the past decades, and those remaining are largely unenforced. n109

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n108 See generally Barbara Ehrenreich et al., Re-Making Love: The Feminization of Sex (1986) (analyzing women's sexual revolution of the 1960s and 1970s).

n109 See Model Penal Code @ 213.2 cmt. 2 (1980) (noting that laws outlawing consensual sodomy are rarely enforced absent some aggravating circumstance). Sex law prosecutions have been rare throughout U.S. history. See Lawrence M. Friedman, A History of American Law 588 (2d ed. 1985). Laws against immorality have generally been used to target particular offenders or as part of a "crackdown" in response to waves of public pressures. See id. A detailed account of the targeted enforcement against Michael Hardwick, the male homosexual defendant-respondent in Bowers v. Hardwick, 478 U.S. 186 (1986), appears in Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431, 1436-39 (1992).

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Yet even as modern feminists embraced the transformative political idea that women's capacity for sexual desire and pleasure should be recognized and valued, the continued sexual violation of women bred yet another generation of feminist sex reformers during the 1970s and 1980s. Like their foremothers, these reformers were determined to advance women's interests by reshaping the content of sexual regulation. A major objective of this movement has been reform of the laws governing sexual relations. n110 Since 1970, rape statutes in most states have been rewritten in response to criticism that such laws punish the victim instead of the perpetrator and do not adequately protect women from sexual coercion. n111 Many states have eliminated the marital rape exception, n112 and public pressure is gradually mounting to force prosecution of some acquaintance rapes. n113 Prohibition of sexual harassment in the workplace has significantly cut back on the nonphysical yet coercive pressure the law permits as a means of gaining a person's consent to sex. n114 Despite this intense activism directed against women's injury and subordination through sex, however, a new effort to enact anti-heartbalm statutes occurred in the 1970s and 1980s. n115 Most of [*401] the seduction statutes remaining on the books today have been amended to apply only to the seduction of a minor child. n116 The Sexual Revolution gave women an acceptance of their own sexual desires, and the feminist movement

against sexual appropriation expressed women's greater sense of entitlement to control their own physical destiny. The stage has been set for feminists to develop an egalitarian, sex-affirming, yet interventionist approach to the legal regulation of sexual relations. But so far, sexual fraud has remained outside the spotlight of feminist concerns.

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n110 See Rosemarie Tong, Women, Sex, and the Law 3-5 (1984).

n111 See id. at 104-19.

n112 Lisa Bernstein, Trends in Marital Rape Laws: Progress or Facade?, 2 UCLA Women's L.J. 273 (1992).

n113 See Susan Estrich, Palm Beach Stories, 11 Law & Phil. 5 (1992).

n114 See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-66 (1986) (recognizing Title VII sex discrimination claim alleging "hostile or abusive work environment"). The sexual harassment cause of action recognizes, for the first time in the law, that economic power is often used to coerce consent to sex. Yet at the present time, the legality of economic coercion of sex is inconsistently regulated; the Title VII claim for sexual harassment limits women's protection to the workplace. Using money to gain sexual consent outside of the workplace is unlawful only if the transaction amounts to a contract for prostitution. There are, for example, no reported cases of criminal prosecution for rape in which the force used was economic. Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. Cal. L. Rev. 777, 821 (1988).

n115 See Sinclair, supra note 28, at 97.

n116 See, e.g., Ind. Code Ann. @ 34-4-4-1 (Burns 1986); Md. Fam. Law Code Ann. @ 5-206 (1984).

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B. Modern Cases

Despite the earlier waves of the anti-heartbalm movement and the progressive liberalization of mainstream sexual values, a substantial minority of states retain the common law seduction action, and a trickle of litigation continues to occur. Since 1960, a handful of appellate cases of seduction brought by adult women in their own names have been reported. n117 Today, seduction remains part of the common law of seventeen states and the District of Columbia. n118 In these and other [*402] states, the common-law seduction action has also been assimilated into the broad category of tort actions for intentional misrepresentation, a species of fraud. n119 Since the early 1980s, tort claims based on deception into sex have been brought in several states under a variety of theories other than seduction, most importantly fraud by misrepresentation. Even those jurisdictions that legislatively abolished the seduction tort may still make available an action for intentional misrepresentation involving agreement to sex. As seduction has evolved into a claim for fraud in a specifically sexual context, a few courts have considered whether the theory of intentional misrepresentation should apply to knowingly false statements and

promises that induce another person's sexual acquiescence. In this theoretical convergence, seduction in its modern form and sexual fraud appear to have become virtually identical theories of liability. n120 The crucial difference between the two theories of action is that the emerging theory of sexual fraud is not gender-specific. n121

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n117 In 1962, the Arizona Supreme Court affirmed against procedural challenge a lower court judgment for the plaintiff in a seduction action, Skousen v. Nidy, 367 P.2d 248, 250 (Ariz. 1962). The Texas Court of Appeals permitted a seduction action to proceed in 1966, Robinson v. Moore, 408 S.W.2d 582, 583-84 (Tex. Civ. App. 1966). In 1967, the North Carolina Supreme Court found that a seduction plaintiff had failed to prove her case that sexual intercourse was "induced by deception, enticement or other artifice," affirming the trial court's dismissal of her claim on the facts but also recognizing the existence of the cause of action. Hutchins v. Day, 153 S.E.2d 132, 134 (N.C. 1967). In a 1974 Wisconsin case, Slawek v. Stroh, 215 N.W.2d 9, 13 (Wis. 1974), a man sued to have his parental rights recognized and the defendant mother counterclaimed for seduction. The Wisconsin court held that her complaint did state a valid cause of action. See id. In 1977, two panels of the Missouri Court of Appeals upheld the validity of seduction in the state's common law. See Breece v. Jett, 556 S.W.2d 696, 705-08 (Mo. Ct. App. 1977); Piggott v. Miller, 557 S.W.2d 692, 694 (Mo. Ct. App. 1977); cf. Greco v. Anderson, 615 S.W.2d 429, 432 (Mo. Ct. App. 1980) (dismissal of seduction action on choice-of-law grounds because Massachusetts law should apply and Massachusetts had by statute abolished seduction). In 1980, North Carolina recognized the continued validity of the seduction action in state law but dismissed the case before it as meritless on its facts. See McCraney v. Flanagan, 267 S.E.2d 404, 405 (N.C. Ct. App. 1980). The most recent reported appeal of a case explicitly brought on a common law seduction theory is Parker v. Bruner, 686 S.W.2d 483 (Mo. Ct. App. 1984), aff'd 683 S.W.2d 265 (Mo. 1985) (en banc), cert. denied, 474 U.S. 827 (1985), discussed infra text accompanying notes 142-147. It is impossible to determine how many additional cases have been filed and settled, dropped or dismissed before trial, or tried to judgment and not appealed. In assessing the significance of the legal trend I am discussing, reliance on appeals reports provides only a limited picture of the incidence and patterns of actual litigation.

n118 In the following states, a revived common law of seduction would not be barred by anti-heartbalm or similar statutes: Arkansas, Arizona, Connecticut, Hawaii, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, and Wisconsin. From the pattern of reported appeals, it appears that seduction litigation remains active today (although at a low level) in many fewer states. See supra note 117. Claims of similar gravamen may also be brought under the sexual fraud theory discussed infra notes 136-138 and accompanying text.

n119 There is evidence that the seduction tort has long been recognized as a specialized genre of fraud or the action for misrepresentation. In an 1860 case, for example, a sympathetic court recharacterized a seduction action as a fraud claim in order to circumvent the common law rule that a seduced victim could not sue in her own name. In Smith v. Richards, 29 Conn. 232 (1860), the victims were two fourteen-year old girls, both orphans. Having gained custody of the girls from a charitable home by promising to provide for them, the

defendant allegedly abused the girls sexually and pressed them into service as prostitutes. By recasting the girls' action as one in fraud, the court granted them standing, and thus allowed their action to proceed. See id. at 241.

n120 See, e.g., Breece, 556 S.W.2d at 707 (noting that "the [seduction] action is a species of fraud").

n121 The restriction of the common law seduction tort to females was implicit in the origins of the cause of action as a remedy for the master's loss of services when his servant or daughter became pregnant. See supra note 28-29 and accompanying text. See generally James E. Davis, Prize Essay on the Laws for the Protection of Women 136-41 (London, Longman, Brown 1854) (discussing common law origins of the tort of seduction). The capacity to be impregnated limited the seduction action to cases involving females, although the master could sue for nonsexual injuries to his male servants or sons under related theories. See Sinclair, supra note 28, at 37. The modern sexual fraud cause of action is not similarly gender-specific, either in theory, see infra text accompanying notes 343-354, or practice, see infra text accompanying notes 264-297.

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In the past, sexual relationships have been immunized from charges of fraud to a far greater extent than economic relationships. n122 Since the early 1980s, however, a handful of courts have recognized deception in sexual relationships as an actionable wrong when serious [*403] harm has resulted. n123 The new theory has met with success in cases presenting the most shocking conduct and the most easily perceptible forms of serious injury. At this early stage, in which the number of reported cases remains small even though several leading jurisdictions have recognized some version of sexual fraud liability, n124 any conclusions about the law must necessarily remain somewhat sketchy and speculative. On the basis of the case law discussed below, however, I offer some tentative observations.

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n122 See infra notes 169-175 and accompanying text.

n123 For discussions of the emerging tort liability for sexual fraud, see Chamallas, supra note 114, at 810-13 (concluding that "prospect of civil liability is no longer farfetched," from study of recent sexual fraud claims); Paula C. Murray & Brenda J. Winslett, The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships, 1986 U. Ill. L. Rev. 779 (examining courts' responses to "novel" tort actions involving fraudulent conduct related to sex); Sarah E. Rudolph, Inequities in the Current Judicial Analysis of Misrepresentation of Fertility Claims, 1989 U. Chi. Legal F. 331, 350-53 (advocating tort recovery and limits on child care obligations for fathers deceived into sex by mothers' misrepresentations of fertility); Note, Heartbalm Statutes and Deceit Actions, 83 Mich. L. Rev. 1770 (1985) (suggesting that actions in deceit based on fraudulent marriage promises are not barred by heartbalm statutes); see also Michael S. Quinn, Comment, Breece v. Jett, Seduction and Fraud -- An Honorable Marriage?, 47 UMKC L. Rev. 464 (1979) (predicting that fraud actions will replace seduction suits in Missouri).

n124 As in assessments of the continuing viability of the seduction action, it is difficult to know from reported cases the actual incidence of litigation

of claims that might be characterized as having been brought under a sexual fraud theory. From informal contacts with lawyers in the course of my research, I know that many claims whose essence is a complaint of sexual fraud (like personal injury actions generally) are settled before full trial and under confidentiality agreements. An additional problem in gaining an accurate sense of the dimensions of this body of emerging law is that claims alleging deception into sex may be brought under a range of legal theories, including intentional and negligent misrepresentation, deceit, fraud, intentional and negligent infliction of emotional distress, professional malpractice, and nuisance, as well as statutory theories available in those states that have legislatively banned certain professional-client sexual contacts.

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The development of a theory of fraudulent inducement to sex is part of a broader trend towards giving greater strength and substance to the legal protection of consent in sexual relations. n125 Just as rape, sexual assault, and sexual harassment laws protect against the use of force, threat, or economic extortion to negate a person's capacity to consent, sexual fraud liability protects against manipulated consent. It would go beyond either the existing case law or the cause of action proposed in this Article to suggest that sexual partners have an affirmative duty to disclose to each other all relevant information regarding their present circumstances or future intentions. Yet some courts are beginning to recognize that minimum standards of honesty and fair [*404] dealing in sexual relationships may be necessary to protect fundamental personal interests in bodily integrity and sexual autonomy.

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n125 Consent is a key measure in current law of the legality of sexual conduct, see Chamallas, supra note 114, at 794-95, and strengthening women's consent in sexual relationships has long been a focus of feminist legal strategies in both theory and practice, see Tong, supra note 110, at 108-19.

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A significant minority of courts, however, have cited two reasons for recognizing an action for intentional sexual misrepresentation: Either an anti-heartbalm statute has eliminated the seduction tort, no matter how the claim is framed, n126 or the subject matter is deemed "not one in which it is appropriate for the courts to intervene," even though the complaint may allege sufficient facts to state a cognizable claim in a nonsexual context. n127 In barring these claims, courts have invoked a variety of public policies, including privacy, n128 the difficulty of balancing the competing interests of the parties or of fashioning a remedy, n129 and the risk that interceding in "interfamilial warfare" may cause excessive "social damage." n130

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n126 See, e.g., Suppressed v. Suppressed, 565 N.E.2d 101, 106 n.3 (Ill. App. Ct. 1990) (dismissing malpractice action based on attorney's sexual relationship with client as "tantamount to allowing a claim for seduction . . . under less strict standards than required by statutes for [such] actions").

n127 Richard P. v. Superior Court (Gerald B.), 249 Cal. Rptr. 246, 249 (Ct. App. 1988).

n128 See, e.g., Perry v. Atkinson, 240 Cal. Rptr. 402, 404-05 (Ct. App. 1987); Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619-20 (Ct. App. 1980).

n129 See C.A.M. v. R.A.W., 568 A.2d 556, 563 (N.J. Super Ct. 1990).

n130 Richard P., 249 Cal. Rptr. at 249. Some courts simply recite the conclusory assertion that not all wrongs afford a legal remedy. See, e.g., C.A.M., 568 A.2d at 560 (averring that "[i]t does not lie within the power of any judicial system . . . to remedy all human wrongs") (citing Richard P., 249 Cal. Rptr. at 249); Perry, 240 Cal. Rptr. at 405 (situating "certain sexual conduct and interpersonal decisions . . . outside the realm of tort liability").

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When a sexual fraud action has been allowed to go forward, courts have often restricted the kinds of injuries for which plaintiffs may recover damages. Plaintiffs have been most successful in recovering for serious physical injuries, including sexually transmitted disease, unwanted pregnancy ending in abortion, and sterility. n131 Emotionally injured plaintiffs have been much less favored; when courts limit the scope of sexual injuries compensable in tort, the claims most often denied are those for emotional distress. n132 The "pure emotion" case is the quintessential instance in which courts fear that recognizing liability for fraudulent sexual misrepresentation will take them far beyond their proper domain. Courts nervously caution that it is not their role to step in whenever a romance might fail. n133 To date, claims have been [*405] allowed for emotional distress in only a few cases, in virtually all of which the fraudulent sexual contact occurred through abuse of a confidential relationship or of some other special relationship of trust or authority. n134 It appears that unwillingness to fully compensate emotional distress constitutes a significant impediment to the emergence of the sexual fraud action; after a spurt of growth in the early-to-mid-1980s, the reported number of new cases has fallen off in recent years. n135

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n131 See, e.g., Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276 (Ct. App. 1984) (disease); Barbara A. v. John G., 193 Cal. Rptr. 422, 427-28 (Ct. App. 1983) (sterility resulting from ectopic pregnancy); Alice D. v. William M., 450 N.Y.S.2d 350 (Civ. Ct. 1982) (abortion).

n132 For example, in Barbara A., 193 Cal. Rptr. at 427-28, the court interpreted the California anti-heartbalm statute to preclude recovery for injury to reputation, but nonetheless allowed a claim for physical injury caused by sexual fraud.

n133 Many seduction plaintiffs also bring related claims for economic or property loss. Male and female plaintiffs have sought to recover money spent for household improvements and purchases or cross-country moves undertaken in anticipation of a future married life. See, e.g., Piccininni v. Hajus, 429 A.2d 886, 887-89 (Conn. 1980) (permitting recovery on fraud theory for $ 40,000 spent renovating, improving and furnishing house in contemplation of marriage); Perthus v. Paul, 58 S.E.2d 190, 191-92 (Ga. Ct. App. 1950) (allowing recovery

on fraud theory where man was induced to quit job in Massachusetts and move to Georgia by lover's false representations that she had divorced her husband and was free to marry); Breece v. Jett, 556 S.W.2d 696, 702-03, 707-08, 710-11 (Mo. Ct. App. 1977) (allowing recovery on conversion theory where woman purchased and moved furniture in reliance on defendant's false promise of marriage). Such economic fraud claims protect interests different from the sexual autonomy interest at stake in claims for fraudulent inducement into sex, and they are not discussed further in this Article.

n134 See infra text accompanying notes 154-164.

n135 In the early-to-mid-1980s, innovative claims alleging personal injury from sexual relations were brought in a range of factual settings. See cases discussed infra at notes 136-166 and accompanying text. After influential early decisions narrowly limited compensable injuries, see cases discussed infra notes 139-140 and accompanying text, cases in the past five to seven years seem, to my reading, somewhat formulaic, sticking to successful arguments and narrow claims without attempting to explore new ground.

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The first sexual fraud cases in the early 1980s involved claims of serious personal injury resulting from a sexual partner's misrepresentation of his or her physical condition. Because the sexual partner lied about or failed to disclose critical facts regarding physical condition, the plaintiff was harmed through sexual contact. The two most common fact patterns were (1) a partner who stated that he or she was free from disease or failed to disclose a sexually transmitted disease, such as genital herpes or HIV infection; n136 and (2) a partner who lied about his [*406] sterility n137 or her use of birth control. n138 Plaintiffs alleged that but for the misrepresentations about health or fertility, they would not have consented to sex with the defendants; and because of the misrepresentation, their consent to sex was not legally effective, and thus did not bar recovery for resulting injuries.

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n136 See, e.g., B.N. v. K.K., 538 A.2d 1175, 1177 (Md. 1988) (herpes transmission); R.A.P. v. B.J.P., 428 N.W.2d 103, 104-05 (Minn. Ct. App. 1988) (same); S.A.V. v. K.G.V., 708 S.W.2d 651, 652 (Mo. 1986) (en banc) (same); G.L. v. M.L., 550 A.2d 525, 526-27 (N.J. Super. Ct. Ch. Div. 1988) (same); cf. United States v. Johnson, 27 M.J. 798, 803-04 (A.F.C.M.R. 1988) (holding that HIV-positive man's participation in homosexual sex constitutes assault even if sexual partner gave uninformed consent to sexual activity), aff'd, 30 M.J. 53, cert. denied, 111 S. Ct. 294 (1990). It appears that intentionally placing another at risk of HIV infection has been most aggressively regulated through the criminal rather than civil law. See, e.g., Fla. Stat. Ann. @ 384.24 (West Supp. 1991) (adding AIDS and HIV to general venereal disease criminal statute and prohibiting infected persons from having sexual intercourse without informing their partners); Okla. Stat. Ann. tit. 21, @ 1192.1 (West Supp. 1991) (making it unlawful for a person to engage in any activity with intent to infect or to cause to be infected another person with HIV absent informed consent of other party); Idaho Code @ 39-601 (1986) (prohibiting a person with AIDS or infected with HIV or other enumerated venereal disease from knowingly or willfully exposing another to those diseases). Every state theoretically could charge a person with the intentional transmission of HIV (or any other

injurious disease) through the traditional criminal law statutes. See Gene Schultz, AIDS: Public Health and the Criminal Law, 7 St. Louis U. Pub. L. Rev. 65, 80-82 (1982). A thoughtful argument against using the criminal law to punish or deter HIV at-risk behavior is found in Kathleen M. Sullivan & Martha A. Field, AIDS and the Coercive Power of the State, 23 Harv. C.R.-C.L. L. Rev. 139, 194-97 (1988) (concluding that criminalization would lead to unfairly targeted enforcement against an already vulnerable population.)

n137 See, e.g., Barbara A. v. John G., 193 Cal. Rptr. 422, 422 (Ct. App. 1983); Alice D. v. William M., 450 N.Y.S.2d 350, 350 (Civ. Ct. 1982).

n138 See, e.g., Stephen K. v. Roni L., 164 Cal. Rptr. 618 (Ct. App. 1980); Faske v. Bonanno, 357 N.W.2d 860 (Mich. Ct. App. 1984); L. Pamela P. v. Frank S., 449 N.E.2d 713 (N.Y. 1983); Hughes v. Hutt, 455 A.2d 623 (Pa. 1983); Linda D. v. Fritz C., 687 P.2d 223 (Wash. Ct. App. 1984).

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Although some courts are now cautiously willing to compensate the physical injuries resulting from fraudulently induced sex, they remain more reluctant to compensate purely emotional injury. For example, a woman was denied recovery for severe phobic fears of sexually transmitted disease arising from the disclosure of her former husband's extramarital homosexual relationships. n139 Perhaps this reluctance to recognize emotional injury from sex is not surprising, given the hostility towards awarding damages for hurt feelings and loss of chastity that fueled the anti-heartbalm movement. n140 On the other hand, this denial of full recovery departs from the ordinary tort rule that compensates all provable and proximately caused injuries, including emotional distress. n141

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n139 See Doe v. Doe, 519 N.Y.S.2d 595, 596-600 (Sup. Ct. 1987). But cf. Carroll v. Sisters of St. Francis Health Servs., No. 02A01-9110-CV-00232, 1992 WL 276717 (Tenn. Ct. App. Oct. 12, 1992) (permitting hospital visitor who pricked finger on used syringes to recover from hospital for emotional distress resulting from reasonable fear of HIV infection).

n140 See supra Part I.A.3.

n141 In tort, where compensation is the remedial goal, legal consequences to the defendant are measured by the extent of the plaintiff's injury. See United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958) (holding that restitution standard determines appropriate compensation). Special damages limits barring compensation for emotional distress traditionally applied to fraud claims, and modern courts vacillate on whether to follow or depart from these restrictions. See Andrew L. Merritt, Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society, 42 Vand. L. Rev. 1, 2-5 (1989). For discussion and critique of rules governing emotional distress damages in fraud cases, and in the sexual fraud context in particular, see infra text accompanying notes 375-392.

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In a few cases, however, courts have awarded emotional distress damages for invasion of an individual's sexual autonomy. In Parker v. [*407] Bruner, n142 for example, a jury awarded plaintiff Alice Parker $ 25,000 in actual and $ 50,000 in punitive damages based on her seduction claim. n143 The facts of the case disclosed a series of misrepresentations over a two-year sexual relationship that led to two unwanted pregnancies, the first of which ended in an abortion and the second in the birth of a child. n144 Although Parker experienced reproductive consequences of what the court held was sex under deceptive pretenses, she was not physically harmed n145 and did not seek damages as a surreptitious means to provide support for her child. n146 Rather, the jury appears to have awarded Parker such substantial damages on the basis of the dignitary and emotional injuries associated with the defendant's misconduct and the abusive surrounding circumstances. n147

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n142 686 S.W.2d 483 (Mo. Ct. App. 1984), aff'd 683 S.W.2d 265 (Mo. 1985) (en banc), cert. denied, 474 U.S. 827 (1985).

n143 See id. at 484.

n144 See id. at 485-86. Alice Parker was 23, a nursing student, and sexually inexperienced; defendant Ronald Bruner was 34, a prosperous dentist, once married and divorced, and sexually experienced. Alice testified that she first consented to have sex with Ronald, despite her religious beliefs that sex was to be reserved for marriage, because the couple often fought about sex, and because Ronald told her he loved her, said he wanted to express his feelings through sexual intimacy and spoke frequently to her about marriage. See id. at 485. Alice became pregnant twice in the course of a two-year sexual relationship. The first pregnancy was aborted at Ronald's insistence. After the first abortion, Ronald obtained a marriage license in an effort to comfort Alice, but later refused to carry out his promise to marry. The relationship ended after Alice refused to abort a second pregnancy. See id.

n145 See id.

n146 Alice brought an independent child support action in conjunction with her seduction claim. See Parker v. Bruner, 692 S.W.2d 379, 380 (Mo. Ct. App. 1985). Historically, unmarried mothers may have used seduction claims as a means to gain child support from fathers. See Grossberg, supra note 72, at 46-47 (noting higher damages awarded in seduction cases involving pregnancy); see also Coombs, supra note 35, at 11 (breach-of-promise-to-marry suits used for same purpose). At common law, fathers were not legally obligated to support children born to them outside of marriage. See, e.g., Doughty v. Engler, 211 P. 619 (Kan. 1923) (noting lack of common-law duty while nonetheless holding father liable). Today, all states require parents, either by statute or through case law, to support children regardless of their birth status. See 1 Homer H. Clark, Jr., The Law of Domestic Relations in the United States @ 5.4, at 317 (2d ed. 1987).

n147 See Parker, 686 S.W.2d at 484.

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Surprisingly, although emotionalism is stereotypically associated with women, male plaintiffs have brought the majority of emotional injury claims in the reported sexual fraud case law. These claims are all closely related in character, involving claims of unwanted fatherhood: Male plaintiffs have asserted painful emotional consequences from being forced to father a child by a woman who lied about her use of birth control before sexual intercourse. In the most common kind of unwanted fatherhood case, the father has brought the sexual fraud claim as a counterclaim to the mother's paternity and child support action. n148 [*408] In some of these cases, the defendant mother has denied that any conversation about birth control took place before sex, raising the possibility that the father was lying to avoid the support obligation. n149 In other instances, however, the mother may have intended to conceive and deliberately used the sexual encounter for that purpose, knowing the intended father would not consent to unprotected intercourse. n150

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n148 See, e.g., Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Ct. App. 1980); Faske v. Bonanno, 357 N.W.2d 860, 861 (Mich. Ct. App. 1984); L. Pamela P. v. Frank S., 449 N.E.2d 713, 714 (N.Y. 1983); Inez M. v. Nathan G., 451 N.Y.S.2d 607, 608 (Fam. Ct. 1982); Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 244 (Sup. Ct. 1985); Hughes v. Hutt, 455 A.2d 623, 624-25 (Pa. 1983); Linda D. v. Fritz C., 687 P.2d 223 (Wash. Ct. App. 1984); cf. Anderson v. Anderson, 552 N.E.2d 546 (Mass. 1990) (father claimed seduction into single act of intercourse by then-wife for purpose of deception into believing that child the wife was then carrying was his child; relief denied); Jose F. v. Pat M., 586 N.Y.S.2d 734, 735 (Sup. Ct. 1992) (male plaintiff sued woman in fraud for lying about use of birth control); Hur v. Virginia ex. rel. Klopp, 409 S.E.2d 454 (Va. Ct. App. 1991) (in separate action, father claimed intentional infliction of emotional distress because mother refused to have abortion or to place unwanted child for adoption; court found no seduction or entrapment and held father liable for child support).

n149 See, e.g., L. Pamela P., 449 N.E.2d at 714.

n150 See, e.g., Hughes, 455 A.2d at 624.

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Whatever the circumstances of conception, the courts have uniformly concluded that when a healthy child is born alive, a misrepresentation of fertility that caused the unwanted pregnancy does not change the parents' support obligations. Unwanted parenthood claims implicate third-party interests of children that are not at stake in narrower disputes between former sexual partners, a difference that helps to justify the courts' categorical refusal to entertain such claims. When a child's interests conflict with those of its parents -- even interests as important to individual autonomy as the decision whether to beget a child -- courts have uniformly concluded that the child must be the overriding consideration. n151 This policy preference for children is consistent with the family law policy protecting the "best interests of the child," according to which child support must be commensurate with the child's needs, regardless of the parents' "fault" in ending their relationship. n152

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n151 Beginning with the earliest unwanted fatherhood case, courts have uniformly denied recovery on public policy grounds that the child's need for support must prevail over the circumstances of unfairness between the parents regarding the child's conception and birth. See Stephen K., 164 Cal. Rptr. at 621. A line of cases following Stephen K. adopted the same reasoning and reached the same outcome. See Faske, 357 N.W.2d at 861; L. Pamela P., 449 N.E.2d at 715; Jose F., 586 N.Y.S.2d at 736; Douglas R., 487 N.Y.S.2d at 245; Inez M., 451 N.Y.S.2d at 609; Hughes, 455 A.2d at 625.

n152 See 2 Clark, supra note 146, @ 18.1, at 362 (marital misbehavior not a factor in determining child support). The outcome in these unwanted fatherhood cases has been criticized as unfair to fathers whose interests are seen as subordinated to those of the mother and her children. See Rudolph, supra note 123, at 332. But courts have applied the same "best interests of the child" policy preference to bar unwanted parenthood claims by mothers as well. In C.A.M. v. R.A.W., 568 A.2d 556 (N.J. Super. Ct. 1990), for instance, a New Jersey court dismissed a sexual fraud claim by a woman who sued her male sexual partner for misrepresenting that he had had a vasectomy; relying on this misrepresentation the women had entered a sexual relationship that resulted in the birth of an unwanted child. The court held that public policy forbade parents to contest the circumstances of a child's conception when the child was born healthy and alive. See id. at 561. When the woman decides to abort an unwanted pregnancy resulting from a partner's misrepresentation of his fertility, however, courts permit the sexual fraud claim. See, e.g., Alice D. v. William M., 450 N.Y.S.2d 350 (Civ. Ct. 1982). The C.A.M. court considered whether the denial of recovery for unwanted parenthood in sexual fraud is inconsistent with the general trend in tort that allows parents to recover under a wrongful conception theory from a doctor or a condom manufacturer. In wrongful conception cases, parents have been compensated for the economic costs of childbirth and the emotional pain and suffering associated with the unwanted birth of a healthy child. See W. Page Keeton et al., Prosser & Keeton on the Law of Torts @ 55, at 371-72 (5th ed. 1984). The C.A.M. court distinguished the wrongful conception cases on the ground that an action for damages brought against a person other than a parent of the unwanted child does not threaten to reduce the custodial parent's financial ability to support the child if required to pay damages to the defrauded parent, or to cause the emotional harm to the child that might result if one parent is allowed to characterize the child's very existence as an injury. See C.A.M., 568 A.2d at 559, 561.

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[*409] In the unwanted parenthood cases, courts limit sexual fraud liability to uphold a public policy of protecting children. By contrast, in confidential relationship cases, public policies favoring protection of the public trust have encouraged broader sexual fraud liability. n153 Courts have been more willing to circumvent anti-heartbalm laws when the fraudulent sexual contact occurred through breach of a fiduciary duty or abuse of some other relationship of special trust. n154 For courts doubtful about their ability to determine the presence or absence of genuine sexual consent, the malpractice framework externally corroborates the plaintiff's claim of nonconsent. n155 Moreover, when there is less doubt about the absence of consent (as in the confidential relationship cases), courts are also more willing to compensate plaintiffs fully for all consequential harms, including emotional injury. n156 In Corgan v. Muehling, n157 for example, a former patient sued her psychologist for emotional and psychological injury stemming from a lengthy sexual

relationship entered into in the course of the therapeutic relationship. n158 [*410] In affirming the trial court's refusal to dismiss her claim, the Illinois Supreme Court held that Corgan, who alleged no physical injury or illness in the action, was not required to do so to recover for her emotional injuries. n159 Corgan demonstrates that where courts believe that the underlying wrong is firmly established, they are less resistant to plaintiff's damages claims. Thus, much of the judicial skepticism about "murky" emotional injury claims n160 may be explained as a lack of confidence in courts' ability to ascertain the presence or absence of sexual consent.

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n153 In confidential relationship cases, there is a sense that the public at large (and not only the defrauded individual) has been injured by the abuse of professional position.

n154 See, e.g., Barbara A. v. John G., 193 Cal. Rptr. 422 (1983) (holding that abolition of seduction tort did not bar misrepresentation and battery action against attorney who entered into sexual relationship with client); Richard H. v. Larry D., 243 Cal. Rptr. 807, 810 (Ct. App. 1988) (holding that anti-heartbalm statute was not intended to lower standard of care owed to patients or to limit liability of psychiatrists for fraud or breach of fiduciary duty).

n155 For the same reason, courts have found it easier to accept complainants' claims of rape by a stranger than claims of rape by an acquaintance. See Susan Estrich, Real Rape 17-18 (1987).

n156 See, e.g., Poor v. Moore, 791 P.2d 1005, 1008 (Alaska 1990) (allowing victims of professional malpractice to recover tort damages for any injury proximately resulting from defendant's conduct, including emotional damages).

n157 574 N.E.2d 602 (Ill. 1991).

n158 The sexual relationship continued throughout the therapeutic relationship, lasting approximately one-and-a-half years. See id. at 603. The plaintiff brought claims for public nuisance (the therapist was unregistered in the state) and negligent infliction of emotional distress. See id. at 604. According to the plaintiff's attorney, no intentional misrepresentation claim was brought (even though the facts supported such a claim) because the plaintiff hoped to collect any judgment from the therapist's insurer, and the relevant policy excluded intentional acts such as fraud from its coverage. Interview with Michael Bolos, attorney for Penelope Corgan, in Joliet, Ill. (July 16, 1991). Insurance companies have been successful in using policy disclaimers of coverage for intentional injury to avoid defending or paying claims for sexual misconduct within professional relationships. See, e.g., Altena v. United Fire & Casualty Co., 422 N.W.2d 485 (Iowa 1988); Horace Mann Ins. Co. v. Leeber, 376 S.E.2d 581 (W. Va. 1988).

n159 See Corgan, 574 N.E. 2d at 607-09. The core of Corgan's complaint was that she had suffered "fear, shame, humiliation and guilt" due to sexual intercourse "under the guise of therapy," and that she had been so emotionally harmed as to require "intensive and extensive psychotherapeutic care and counseling" to deal with the psychological aftermath. Id. at 603. The Corgan decision relied heavily on the professional obligations a therapist owes to a

patient, and emphasized a therapist's special obligation to deal ethically and sensitively with the heightened vulnerability and trust of a patient seeking mental health care. Even when the parties do not have a recognized fiduciary relationship like that between doctor and patient, the courts have been more willing to intervene when the sexual abuse occurs within a relationship of special trust. See, e.g., Delia S. v. Torres, 184 Cal. Rptr. 787 (Ct. App. 1982) (permitting civil action for emotional injuries arising from rape of immigrant Filipino woman by respected professional, leader in her immigrant community, and friend of her husband); Franklin v. Hill, 417 S.E.2d 721, 724 (Ga. Ct. App. 1992) (finding that sexual relationship between male high school teacher and 15-year-old female student involved "disparity of power" that supported claim for seduction).

n160 See generally Peter A. Bell, The Bell Tolls: Toward Full Tort Recovery for Psychic Injury, 36 U. Fla. L. Rev. 333, 336-40 (1984) (summarizing judicial resistance to full tort recovery for emotional injury).

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In confidential relationship cases, courts rely on malpractice or fiduciary duty concepts in defining the seduction as a breach of the professional duty to act in the client's best interests. n161 Although the [*411] courts fear being asked to step in every time a romance ends unfairly, they are comfortable with confidential relationship cases because regulation of professional ethics is a familiar and accepted role for government. It is perhaps understandable that courts are more concerned about sexual fraud in confidential relationships: The behavior involved is often outrageous, n162 and it is perpetrated by a person sanctioned by society as a trustworthy individual. n163 Abuse of a confidential relationship thus not only offends the victim but also undermines the credibility of other professionals by transgressing fundamental social and ethical norms. n164 Against this background of formalized obligations, the professional defendant is much less sympathetic and the victim more credible.

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n161 For example, in Cotton v. Kambly, 300 N.W.2d 627 (Mich. Ct. App. 1980), the court upheld a patient's malpractice claim that her psychiatrist had induced her into a sexual relationship under the guise of prescribed therapy. The court held that this type of medical malpractice is not to be distinguished from other types, such as for improper administration of a drug or negligent surgery: "In each situation, the essence of the claim is the doctor's departure from proper standards of medical practice." Id. at 628-29. Similarly, in DeStefano v. Grabrian, 763 P.2d 275, 284 (Colo. 1988), the court recognized a claim for breach of fiduciary duty in the complaint of a married couple against a priest who had engaged in a sexual relationship with the wife while serving as the couple's marriage counselor.

n162 See Poor v. Moore, 791 P.2d 1005, 1006 (Alaska 1990) (biofeedback therapist impregnated mentally ill client); McDaniel v. Gile, 281 Cal. Rptr. 242, 245-46 (Ct. App. 1991) (attorney sexually harassed client and withheld legal services to gain sexual favors); Destefano, 763 P.2d at 278-79 (priest initiated sexual relations with female member of couple who came to him for marriage counseling).

n163 See, e.g., Destefano, 763 P.2d at 278-79 (priest); Franklin, 417 S.E.2d at 722 (high school teacher); Hoopes v. Hammargren, 725 P.2d 238, 239-40 (Nev. 1986) (doctor); Erickson v. Christenson, 781 P.2d 383, 385 (Or. Ct. App. 1989) (minister).

n164 See, e.g., Destefano, 763 P.2d at 285 (noting legal consensus favoring liability of professional counselors for damages caused by sexual relations with clients). The Oath of Hippocrates taken by all medical doctors contains a promise not to "seduc[e] . . . in connection with . . . professional practice," quoted in Goncaves v. Saab, 538 N.E.2d 142, 147 (Ill. App. Ct. 1989). The California Supreme Court recently became the first U.S. court to approve a disciplinary standard for lawyers who enter into unethical sexual relationships with clients. See Rules on Lawyers' Sex Conduct OK'd, L.A. Times, Aug. 17, 1992, at A19. However, the California standard applies only to relationships that are coercive or that interfere with the lawyer's effective representation. See id.

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The problem of determining sexual consent is not unique to the sexual fraud case law, but rather reflects a jurisprudential and cultural lag evident throughout modern society's attitude towards sexual boundaries. For both lawyers and lay observers, dramatic changes in gender roles and norms of sexual interaction have rendered the definition of sexual consent ever more elusive. I believe a major cause of this uncertainty is our failure to respond to a world of greater sexual parity between men and women by working out a coherent normative theory of the mutual obligations to be shared by equal sexual partners. Certainly, the Victorian seduction tort gained its coherence and power by embedding itself within a cultural narrative that drew on potent patriarchal anxieties about evolving gender relations. Yet so far no one has fully articulated a contemporary theory of sexual obligation that both recognizes women as equals and frees sexuality from the strictures of Victorian moralism. n165 However sketchy and tentative, the [*412] reemergence of seduction in various modern forms reflects an important theoretical movement towards such a model of sexual parity. The tort recognizes that sexual abuses short of forcible rape cause significant harm and should be regulated, and that even when violence is absent, nonconsensual sex invades an important personal interest in sexual autonomy that the law should protect. n166 This recognition is consistent with the emergence of meaningful consent as the appropriate legal standard for regulating sexual conduct, and also with a commitment to protect sexual autonomy as an aspect of human personality and well-being. This Article seeks to clarify and extend this emerging norm of mutual obligation between sexual equals by demonstrating how it can and should apply to instances of nonviolent coercion into sex.

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n165 One important practical effect of such a theory would be to remove many of the existing judicial objections to compensating the emotional harms that flow from nonconsensual sex. See infra notes 375-382 and accompanying text.

n166 See Stephen J. Schulhofer, Taking Sexual Autonomy Seriously: Rape Law and Beyond, 11 Law & Phil. 35, 36 (1992) (arguing that "non-violent impairment of sexual autonomy" warrants legal protection).

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II. FRAUD AND SEXUAL CONSENT

"As if there were two hells, one for sins against love, the other for those against justice!"

-- Pascal n167

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n167 Blaise Pascal, Pensees 318 (W. F. Trotter trans., Random House 1941) (1670).

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Many scholars have noted the asymmetric legal protection provided within the commercial as opposed to the sexual sphere. n168 The common law protects parties to commercial transactions whose choices are coerced by violent threats, economic extortion, fraud, and even some careless failures by another party to disclose useful facts. n169 When a person consents to sex, however, the law permits a far broader range of coercive practices to distort and manipulate her choices, including all the psychological and emotional tactics of deception. To put it plainly, a man may do things to get a woman's agreement to sex that would be illegal were he to take her money in the same way. For the purposes of this Article, I use the shorthand term "sex exception to fraud" when referring to the law's failure to protect the decision to have sexual relations from coercion by fraud.

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n168 See, e.g., Richard A. Posner, Sex and Reason 392-95 (1992); J.H. Bogart, On the Nature of Rape, 5 Pub. Aff. Q. 117, 124-25 (1991); Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 Colum. L. Rev. 1780, 1802-04 (1992); Susan Estrich, Rape, 95 Yale L.J. 1087, 1115-21 (1986); Stephen J. Schulhofer, The Gender Question in Criminal Law, 7 Soc. Phil. & Pol'y 105, 135-37 (Spring 1990); Schulhofer, supra note 166, at 88-93.

n169 See John D. Calamari & Joseph M. Perillo, The Law of Contracts @ 9-3, at 264-65 (2d ed. 1977) (violent threats); id. @ 9-7, at 271 (economic extortion); id. @ 9-13, at 277 (fraud); id. @ 9-14, at 278-79 (negligent misrepresentation); id. @ 9-20, at 287-92 (duties to disclose). Thus, in the marketplace protections against dishonesty have gone far beyond the comparatively modest standard of intentional misrepresentation proposed in this Article.

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[*413] Protections against dishonesty in the marketplace outstrip even the standard for sexual fraud proposed in this Article. In the marketplace, a generally stringent standard of fair dealing replaces the laissez-faire bargaining norm. Adherence to caveat emptor in commerce has fallen away in this century because commercial actors have found that honesty stabilizes the marketplace and encourages transactions. n170 Ian MacNeil has documented the growth of business contracting practices that reject the market model of

adversarial, arm's-length dealing in favor of a relational norm stressing mutuality and reciprocity, protection for reliance and expectation interests, and preference for doing things "the right way," with respect both to the relationships between the parties and to the broader social welfare. n171 Ironically, the principle of caveat emptor remains most vigorously alive in the sexual marketplace. n172

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n170 See generally Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy 48-49 (1992) (noting premium on predictability and transactional standardization in twentieth-century economy, in which laissez-faire bargaining model was superseded by regulatory standards of contracting).

n171 See Ian R. MacNeil, The New Social Contract: An Inquiry into Modern Contractual Relations 71-119 (1980); Ian R. MacNeil, Relational Contract: What We Do and Do Not Know, 1985 Wis. L. Rev. 483, 523-24 & n.186.

n172 See infra notes 255-256 and accompanying text.

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This Part challenges the narrower legal definition of coercion (and the correspondingly weaker meaning of consent) that applies to sexual relations. Although commentators hesitantly agree that gaining sexual cooperation by fraud is as culpable as other forms of deceptive appropriation that are already (and uncontroversially) unlawful, n173 most also believe that making fraud an unlawful means of sexual initiation would nonetheless be "difficult" n174 because of the unique nature of sexual relations. n175 The view that different rules ought to apply to sexual as opposed to other types of human relations is a legal commonplace. Yet many of the rationales offered in support of the sex exception to fraud merely assert, rather than explain, the difference between sex and money. I challenge the validity of this double standard by arguing that protection against nonconsensual relations is as important and as practicable in sex as in other spheres of human interaction. By protecting consent in sexual relations less vigorously than in commercial relations, existing law embodies a hierarchy of values that either ranks sexual integrity unjustifiably low or the integrity of market transactions unjustifiably high.

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n173 See, e.g., Dripps, supra note 168, at 1802 (asserting that no rights-based distinction can be made between sexual fraud and commercial fraud, "because nobody claims a right to deceive their [sic] sex partners").

n174 Id. at 1803.

n175 These objections are discussed in detail infra notes 266-297 and accompanying text.

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[*414] A. The Sex Exception

1. Coercion and Consent. -- Regulating human relationships is among the most difficult of legal tasks. In interactions between people, ordinarily it is not the essential character of an act that makes it wrongful, but the meaning and consequences of that act within a particular set of circumstances. The same relational conduct may be lawful in one instance and criminal or tortious in another. Sexual activity provides an obvious example: Sexual intercourse may be an entirely private matter if consensual, but it constitutes an unlawful sexual assault if carried out by force. Because there is nothing morally wrong with sexual intercourse per se, legal regulation of sex must reach beyond the relatively simple task of defining bad conduct to the more complex and uncertain task of judging in a particular instance what an actor's intentions were, and the consequences of his or her acts for other persons.

The principal regulatory line in sexual relationships is drawn between voluntary and involuntary interactions. Consent signals the location of that crucial boundary, and coercion denotes the absence of consent. n176 One who consents to an interaction accepts the consequences of the relationship she enters; one who is coerced into sex assumes none of the risks involved in the same encounter.

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n176 "To coerce is to make or force someone to do something." Marilyn Frye, In and Out of Harm's Way: Arrogance and Love, in The Politics of Reality: Essays in Feminist Theory 52, 54 (1983).

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Coercion can take many forms. Free choice may be thwarted by compulsion of the body through physical violence, or more subtly by the creation of false belief through deception. Philosopher Sissela Bok defines deception as follows: "When we undertake to deceive others intentionally, we communicate messages meant to mislead them, meant to make them believe what we ourselves do not believe. We can do so through gesture, through disguise, by means of action or inaction, even through silence." n177 In terms of degree of harm, deception into sex is not as physically injurious as rape by force; yet like a rape, sexual fraud falls on the wrong side of the consent line. As when force or threat is used to accomplish a rape, or when economic extortion is employed to commit workplace sexual harassment, sexual deception can subvert a victim's will, changing an apparently voluntary exchange into an involuntary one. The tort action for sexual fraud is founded on the moral and functional equivalence of force and fraud as comparable kinds of coercion. n178

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n177 Sissela Bok, Lying: Moral Choice in Public and Private Life 13 (Vintage Books 1989) (1978). Bok's moral definition of deception closely tracks the elements of the intentional fraud action. See infra part III.

n178 Force and fraud have comparable effects on voluntariness, but differ in the degree of harm they cause to the victim. Accordingly, the law ordinarily punishes instances of coercion by force more severely than coercion by fraud. For example, a person robbed of her money at gunpoint suffers greater emotional and psychic harm (terror and fear of death) than were she tricked into squandering her life savings on Florida swampland. Although she acknowledges

that sexual coercion by fraud violates bodily integrity, privacy, and autonomy, Lynne Henderson argues that a woman deceived into sex by someone she knows does not experience the same physical terror and fear of death suffered by a victim of rape by a stranger. See Lynne N. Henderson, Review Essay: What Makes Rape A Crime?, 3 Berkeley Women's L.J. 193, 226-27 (1988) (reviewing Susan Estrich, Real Rape (1987)). This difference accounts for the less serious legal consequences of sexual fraud.

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[*415] The law regulates the voluntariness of relationships out of a moral respect for persons and to avoid distortions in human interaction. n179 Under even the minimalist justification for governmental action offered by classical liberal theorists, n180 coercion justifies legal intervention in what would otherwise be private relationships. n181 The distinction between coercion and consent also determines when a victim may be held legally responsible for her conduct and choices. Under the doctrines of legal excuse for duress or fraud, an individual is not culpable for actions taken or choices made under coercive influence. n182 Conversely, if a victim willingly and knowingly consents to an otherwise coercive influence, the taint of involuntariness is removed and she is again accountable for her actions. A victim's consent can negate a perpetrator's liability for otherwise unlawful coercion, n183 but if that consent was obtained by force or fraud, the attempted defense fails. n184

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n179 The first rationale expresses a dignitary justification of fraud; the second, an economic or transactional justification. Although the argument in this Article focuses on the dignitary justifications for fraud, the sexual fraud theory I propose can be justified under either concept. See infra notes 266-297 and accompanying text.

n180 John Stuart Mill stated that the government may justifiably interfere with an individual's freedom of action in order to protect its citizens from harm: "[F]or such actions as are prejudicial to the interests of others, the individual is accountable and may be subjected . . . to legal punishment if society is of opinion that . . . [it] is requisite for its protection." John Stuart Mill, On Liberty 163 (Gertrude Himmelfarb ed., Penguin Books 1985) (1859). In restating Mill's fundamental liberty principle, Judge Richard Posner emphasizes the philosophical importance of free choice and its corollary, voluntariness: in general, the state should not interfere in "voluntary transactions that impose no uncompensated costs on nonparties." Richard A. Posner, The Ethical Significance of Free Choice: A Reply to Professor West, 99 Harv. L. Rev. 1431, 1431 (1986).

n181 The state's interest in protecting its citizens from harm is the primary principle underlying tort law. See Restatement (Second) of Torts @ 870 cmt. f (1977) ("Physical harm to the person has been recognized as the basis for an intentional tort from the earliest days of the common law."); Keeton et al., supra note 152, @ 4, at 25 (prophylactic factor of preventing future harm an organizing principle of tort).

n182 See Restatement (Second) of Torts @ 892B cmts. h & j.

n183 See id. @@ 60 & 892 (consent by other party may be defense to actor's civil liability).

n184 See id. @ 892B cmts. h & j.

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Consent is thus more than a fiction or a formality in the law of fraud. The victim concedes that at one level she did consent, effectively "stealing the thunder" from efforts to infer genuine volition from the mere appearance of assent or acquiescence. n185 Paradoxically, it is the [*416] fraud victim's concession of consent at a surface level that makes possible a substantive examination of the actual foundations of her choice.

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n185 Feminist theorists have concluded that the unwillingness of lawmakers and courts to make sexual consent mean something substantive to the individual from whom it is procured is one of the key mechanisms by which women's subjective experience and empirical reality is devalued in law. See Carol Smart, Feminism and the Power of Law 32-34 (1989); see also Carole Pateman, Women and Consent, 8 Pol. Theory 149, 150 (1980) ("consent as ideology cannot be distinguished from habitual acquiescence, assent, silent dissent, submission, or even enforced submission. Unless refusal of consent or withdrawal of consent are real poossibilities, we can no longer speak of 'consent' in any genuine sense.").

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My argument against current limits on the scope of fraud protection rests on a modern, dignitary view of the tort's function in protecting the individual's freedom to act without coercion. From this dignitary perspective, it seems arbitrary and discriminatory to protect the voluntariness of economic but not sexual interactions. One possible explanation for fraud's exclusive focus on economic interests is its early doctrinal origins in the law of contract. But a closer inquiry into the history of fraud refutes this explanation. Although both misrepresentation and contract law began as facets of assumpsit, n186 misrepresentation emerged more than two hundred years ago as a tort independent of its contractual roots. n187 Since that time, misrepresentation has expanded to protect a broad range of both dignitary and economic interests. To invoke the tort's early doctrinal origins as a justification for current disregard of sexual interests would treat the common law as if it had not developed since the late eighteenth century.

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n186 See 1 Thomas A. Street, The Foundations of Legal Liability 374-77 (1906). It is a mistake to presume that what "contract" means today (a wholly executory agreement) is what "assumpsit" meant at common law. Until well into the nineteenth century and the rise of laissez-faire political and economic principles, assumpsit included reliance-based obligations imposed by law (including obligations addressed under modern law through tort theories of fraud or contract theories of quasi-contract and unjust enrichment). See P.S. Atiyah, The Rise and Fall of Freedom of Contract 184-86 (1979).

n187 The tort action for misrepresentation (historically called "deceit") first appeared in 1201 as a writ of narrow scope allowing an action against a person who had manipulated legal procedure in order to defraud someone. See Keeton et al., supra note 152, @ 105, at 727-28. The notion of liability for harmful lies progressively broadened and came to be used to address many of the contract issues that modern law treats as breach of contract or warranty problems. See id. By the eighteenth century, deceit had developed into a generic remedy for misrepresentations that resulted in actual harm, but only when the parties had some preexisting contractual relation. See id. After the pivotal 1789 case of Pasley v. Freeman, 100 Eng. Rep. 450 (K.B. 1789), which allowed a plaintiff to sue someone on whose representations he had relied in extending credit to a third person, the common law began to allow claims of misrepresentation between parties who had no previous contractual tie, thereby establishing misrepresentation as an independent tort action. See 2 Fowler V. Harper et al., The Law of Torts @ 7.1, at 377-78 (2d ed. 1986). By the late eighteenth century, misrepresentation had departed from contract and lodged itself in tort as an independent cause of action addressing injuries caused by reliance on a false promise or statement.

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[*417] Clarifying the tort basis of the modern action for misrepresentation is important for two reasons. First, although contract developed in the common law primarily to promote economic transactions, n188 tort has traditionally concerned itself with the dignitary interests in bodily integrity and human personality. n189 Second, tort liability and contract derive from distinct sources, a difference that may affect perceptions of the fairness of imposing a duty of honesty in particular encounters. From a contractarian perspective, a person incurs liability only for those obligations that she has voluntarily accepted. By contrast, tort law imposes a set of background legal duties grounded in social morality or custom, regardless of a person's purposive choice. There is a mistaken tendency to conceive of any liability that arises from the act of promising as necessarily arising in contract. But where the claim is tortious misrepresentation, the false promise instead constitutes only the mode of inflicting injury. n190

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n188 In the nineteenth century, contract was needed to facilitate arm's length economic transactions -- an emerging social and economic phenomenon that did not fit into the structure of adjudication adapted to communal disputes cognizable in tort and criminal law. See Atiyah, supra note 186, at 24-35. Since contract law took the regularization of arm's-length transactions to be its raison d'etre, it understandably disdained to regulate a whole range of promises that lay outside that domain. Although this historical development explains why contract law protects economic rather than dignitary or sexual interests, it does not explain why a tort such as misrepresentation should protect only interests of a contractual character.

n189 See Keeton et al., supra note 152, @ 92, at 655. For many traditional scholars, however, the notion of fraud remains colored with a commercial tone, and modern courts still occasionally assert that fraud is an action solely designed to address economic complaints. See, e.g., Dan B. Dobbs, Handbook on the Law of Remedies @ 9.2, at 602 (1973); Harper et al., supra note 187, @ 7.1, at 378 & n.3; Keeton et al., supra note 152, @ 105, at 726; Francis H. Bohlen,

Misrepresentation As Deceit, Negligence, Or Warranty, 42 Harv. L. Rev. 733, 733-34 (1929). For a judicial statement of the pecuniary restriction on fraud recovery, see Walsh v. Ingersoll-Rand, 656 F.2d 367, 370 (8th Cir. 1981). Other commentators dismiss this narrow view of fraud as outdated. See, e.g., Keeton et al., supra note 152, @ 105, at 726 (noting absence of persuasive rationale for limiting fraud recovery to pecuniary losses); Leon Green, Deceit, 16 Va. L. Rev. 749, 749 (1930) (advocating extension of fraud protection to wide range of economic and noneconomic interests).

n190 Acts of misrepresentation and nondisclosure run through a wide variety of torts, as a method of accomplishing various types of tortious conduct. See Keeton et al., supra note 152, @ 105, at 725 (citing examples of battery, false imprisonment, defamation, intentional infliction of emotional distress, and trespass accomplished through false inducement of another).

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In this Article, I apply the existing law of intentional misrepresentation to deceptions undertaken for the purpose of gaining sexual consent. If respect for individuals as free choosers explains the existing legal rules against fraud, the theory of liability proposed here seems to fit easily within an already well-established regulatory principle. Today, however, courts rarely consider it unlawful to deceive someone into agreeing to sex. Although force and fraud are equated when it comes to money, the same analysis is not usually extended to sex. It is both a [*418] tort and a crime to take money by false pretenses, but in most jurisdictions it is lawful to obtain consent to sex by intentionally deceiving one's partner. n191 My discussion must therefore come to grips with the revealing wrinkle in the applied scope of fraud that effectively excludes sexual relations from its protection.

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n191 See supra notes 118-119 and accompanying text (sexual fraud tort currently established in only minority of states and only in limited circumstances); see also Model Penal Code @ 213.1 cmts. 4 & 7 (1962) (defining "rape" to include "gross sexual impositions" arising from deception, such as impersonation of husband, but excluding other traditional forms of fraud). For a discussion of these "exceptions to the sex exception," see infra notes 192-208 and accompanying text. This Article focuses exclusively on theories of civil liability for sexual deception and does not discuss whether deceptive sex should result in criminal liability. For a discussion of criminalization of forms of sexual deception as a lesser degree of sexual misconduct than rape, see Schulhofer, supra note 168, at 135-36; Schulhofer, supra note 166, at 88-93.

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2. "Not as Bad as Rape." -- By equating force and fraud in its working definition of coercion, the law demonstrates a nuanced grasp of how body and mind are fused in human personhood. If laws against the use of force guard against threats to the will directed through the body, the rules against fraud protect against the "shackled mind." When it comes to sex, however, the law embraces a perverse literalism about the capture of a victim's capacity to choose. In enforcing the law of rape, for example, law and public opinion tend to presume that a woman has freely chosen a sexual encounter unless her assailant literally overcomes her physically. If her own will to any degree

directed her body, she chose the sex; in crude parlance, she "wanted" it. n192 Thus the woman who responds to a show of physical force by sexually "going along" may find that no one later believes her claim of rape, because in some constrained sense she chose the sex over the force. n193 Likewise, the deceived woman who willingly (perhaps even passionately) makes love with a seducer may not be seen as having been sexually coerced, because she used her admittedly manipulated capacities for perception and judgment to choose. In both instances, the victim has chosen only under unjustly imposed constraints. Yet the focus of judgment is on the remaining shreds of her continued formal capacity to choose, rather than the extremity of the constraints under which she acts -- on the victim's conduct, rather than that of the wrongdoer.

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n192 See Frye, supra note 176, at 54.

n193 This implicit judgment appears to explain the recent decision by a Texas grand jury not to indict for rape a man who broke into a woman's house at 3:00 a.m., threatened her with a knife and demanded sex. Before he penetrated her, the victim asked her assailant to wear a condom as protection against HIV infection. Defense counsel speculated that the grand jury refused to indict because the victim's presence of mind implied her consent to sex. Ross E. Milloy, Furor Over a Decision Not to Indict in a Rape Case, N.Y. Times, Oct. 25, 1992, @ 1, at 30.

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This literalism about sexual consent fails to recognize a principle that seems obvious in nonsexual contexts: A victim's will may be bent [*419] to the coercer's ends by means other than physical force. Force, fear, and fraud work in much the same way: The wrongdoer arranges the victim's world so that the act he wants her to perform appears as her best choice. n194 The victim then makes the desired choice and does what the coercer wants. Yet the victim's perceptions have been manipulated so as to bend her will to another's purposes. This is true when the coercer threatens to kill the victim's child unless she complies; it is also true when the coercer tells the victim a web of lies causing her to misperceive her present circumstances or future possibilities, and thus prompts her to make a compromised choice. For the duration of the threat or the deception, the coercer has captured the victim's will for his own ends. Only a shallow and formalist understanding of moral agency and rational action would allow us to believe that the victim has "chosen" anything under these circumstances. n195

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n194 See Frye, supra note 176, at 55-57.

n195 In defining the modern tort of misrepresentation, the Oregon Supreme Court recently adopted a nineteenth-century construction of the statutory term "inveiglement," which embodies the idea of a capture of the victim's will:

"To inveigle a person . . . is to seduce them, to entice them, not by force, but by some art, some device, some representation which is essentially false, and calculated to secure action on the part of the person sought to be inveigled; to secure his acquiescence in the purpose of the mover, so that he

may become within the control of some person or persons . . .; and the device, the art, the seduction, the inveiglement, must be, I suppose, adequate to that end. It is not necessary that force be used. Using force is a distinct case, and, where no force is necessary to be used, the party goes apparently with his will, but on a false impression of where or why he is so going. It stands to reason that the party who acts upon a false representation, upon a device or trick, which misleads him, though apparently acting with his own free will, is . . . acting against his will."
Oregon v. Amell, 736 P.2d 561, 563-64 (Or. 1987) (quoting In re Kelly, 46 F. 653, 665 (C.C.D. Or. 1890)).

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Although no commentator denies that something like a sex exception to fraud exists, influential liberal theorists Richard Posner and Joel Feinberg have sought to defend the asymmetry in legal protection as appropriate. In his recent book discussing sexual regulation, n196 Sex and Reason, Judge Posner attempts to locate even fraudulently procured sex within his definition of "consent": "[I]f the woman is not averse to having sex with a particular man, the wrong if any is in the lies (and we usually do not think of lying in social settings as a crime) rather than in an invasion of her bodily integrity." n197 Having already consented to have sex with this partner, Posner's argument goes, a woman suffers no additional harm in later discovering that she consented under false pretenses -- "No harm, no foul." In arguing that sexual fraud does not result in an "invasion of . . . bodily integrity," n198 Posner presumably means to distinguish fraudulently induced sex from forcible rape, [*420] which he believes should be regulated. n199 This purported distinction, however, is one of degree rather than of kind. When sexual consent is coerced, whether by force or fraud, the result is nonconsensual sex, a moral and physical dispossession of one's sexual body.

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n196 See Posner, supra note 168.

n197 Id. at 392.

n198 Id.

n199 See id. at 386-87.

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Nonetheless, for Posner it appears that gaining compliance through force is a sexual imposition meaningfully different from using deception to manipulate the victim's will for the same end. To find sexual fraud noncoercive, Posner must analytically sever the transaction of bodies (the sex) from the transaction of minds (the consent) that preceded it. Because the body was willing, he concludes, no inquiry into the mind's desires is necessary. Posner's view denies not only the unity of body and mind inherent in the equivalence of force and fraud, but also the fusion of sensation and meaning that characterizes the human experience of sex itself.

Philosopher Joel Feinberg offers a more elaborate version of Posner's "not as bad as rape" argument. n200 Like Posner, Professor Feinberg denies that sexual

fraud can be usefully compared to forcible rape, even though he concedes that sex procured by fraud is as involuntary as sex procured by force. n201 The real source of distinction between force and fraud, according to Feinberg, is in the degree of harm to the victim that results from the coercion involved: "Compulsion is not necessarily more destructive of voluntariness than deception is, but it is normally more harmful in itself." n202 For Feinberg, it takes more than lack of consent or involuntariness to make a sexual encounter unlawful; some form of violence, with its accompanying harms of terror and physical danger, must also be present to make involuntary sex bad enough to justify legal intervention. But does it follow that because coercion accompanied by violence is worse than coercion alone, coercion without violence is not a wrong (albeit of lesser degree)? Coercion alone is harmful enough to justify fraud liability in economic relationships, for example, but apparently not harmful enough in sexual relationships. The law already punishes force more severely than fraud for the very degree-of-harm reasons that Feinberg has identified. Neither Feinberg nor Posner can explain why a difference in degree of consequential harm makes force and fraud different in kind.

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n200 See Joel Feinberg, Victims' Excuses: The Case of Fraudulently Procured Consent, 96 Ethics 330 (1986).

n201 See id. at 339.

n202 Id.

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A variation of Feinberg's degree-of-harm argument is the claim that involuntary sex with a known person (as in the case of deceptive sex) is not as degrading as involuntary sex with a stranger, and thus deserves lesser or no punishment. n203 In Sex and Reason, for example, [*421] Posner defends legal rules that treat as rape two specific instances of sex by fraud: a man who has sex with a woman by impersonating her husband, and a medical practitioner who inserts his penis into a patient's body under the guise of administering "medical treatment." n204 In these two special instances of deception into sex, Posner contends that "the act itself, were the true facts known to the woman, would be disgusting as well as humiliating, rather than merely humiliating as in the case of the common misrepresentations of dating and courtship." n205 For Posner, the disgust suffered by the deceived wife or patient justifies a legal response that garden-variety sexual deceits do not: If more injury than mere involuntariness is required to make a sexual encounter unlawful, these cases provide enough special degradation to justify liability. n206

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n203 This rationale is cited for treating marital or acquaintance rapes more leniently than stranger rapes. See Estrich, supra note 155, at 25. Empirical studies comparing victims' reactions to rape by intimates with victims' reactions to rape by strangers refute this rationale. Women who are sexually coerced in intimate relationships report the same feelings of bodily invasion and loss of sexual control as women raped by strangers. See Diana E. H. Russell, Rape in Marriage 190-205 (Indiana University Press 1990) (1982). Although women raped by men they know (and perhaps love) are often spared the

fear of imminent death, they suffer additional emotional and psychological injury stemming from the betrayal of the relationship and the breach of trust. Some research suggests that women raped by intimates may in fact experience greater emotional and psychological injury over time than women raped by strangers. See Russell, supra, at 193; see also Mary P. Koss et al., Stranger and Acquaintance Rape: Are There Differences in the Victim's Experience, 12 Psychol. Women Q., 1, 3 (1988) (finding that victim-offender relationship did not predict severity of post-rape psychological injuries). See generally Peter Rutter, Sex in the Forbidden Zone (1989) (finding that victims of incest, sexual assault, and sexual contact within confidential relationships report similar feelings of anger, abandonment, humiliation, guilt, self-doubt, and mistrust of men). Although existing research focuses either on sexual abuse in professional relationships, or on the effects of forced rather than deceptive sex in intimate relationships, the evidence that sexual force and sexual abuse in relationships of trust cause serious and lasting emotional injury strongly suggests that sexual fraud is also emotionally harmful.

n204 Posner, supra note 168, at 392-93.

n205 Id. at 392-93.

n206 See id. at 392.

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The feelings of people deceived into sex under false pretenses are neither so predictable nor generalizable as Posner's effort to distinguish between "disgusting" and merely "humiliating" sexual encounters assumes. Nor can this attempt to keep the exceptions from overwhelming the rule be reconciled with Posner's rationale for making fraud unlawful in nonsexual relationships; if consistently applied, his logic would do away with the sex exception altogether. n207 The justification for fraud liability under Posner's economic theory rests on the fact that the fraudfeasor, in making "a positive investment in misinformation . . . [which] investment is completely wasted from a social standpoint," rebuts the operative economic presumption that exchanges [*422] between people increase utility. n208 Although this Article defends a dignitary justification of recovery for fraud, the point remains the same from either a dignitary or an economic view: Fraud is harmful because it subverts the capacity of individuals to choose relationships and pursue experiences that further their best interests. The problem under either approach is the involuntariness of fraudulent exchanges, not the visceral feelings they may generate.

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n207 See Richard A. Posner, Economic Analysis of Law @ 4.6, at 97 (3rd ed. 1986).

n208 See id.

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3. Victim Self-Help. -- These arguments for denial of legal remedy would leave sexual fraud victims where they are today in most jurisdictions, with self-help as their only remedy. Posner, for example, acknowledges that under current law victims of sexual fraud are less protected from dishonesty and

manipulation than those deceived in nonsexual relationships, particularly marketplace transactions for which fraud provides a well-established check on otherwise consensual relations. n209 But Posner concludes that denying a remedy for sexual fraud is sensible, because of the difference between "social settings" and other arenas of human interaction:

> Ordinarily, to be sure, the law does not place the burden of preventing fraud on the victim; it is cheaper for the potential injurer not to commit fraud than for the victim to take measures of self-protection against it. . . . [But] [t]he problems of proof of seduction by false pretenses . . . argue for making a difference in degree a difference in legal kind, substituting victim self-protection for legal remedies. n210

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n209 Posner acknowledges: "[G]enerally it is not a crime to use false pretenses to entice a person into a sexual relationship. Seduction, even when honeycombed with lies that would convict the man of fraud if he were merely trying to obtain money, is not rape." Posner, supra note 168, at 392.

n210 Id. at 393.

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Thus, Posner suggests a fundamental distinction between sexual relationships and commercial transactions. In economic terms, Posner would presumably contend, potential victims of sexual fraud are the cheapest cost-avoiders.

Elsewhere, Posner has further elaborated on what he means by "self-protection" against fraud in intimate relationships. n211 According to Posner, prospective romantic partners can choose to prolong courtships, permitting comparison of the prospects of various suitors and a careful investigation of the personal qualities of the most promising candidate. Because waiting is possible, legal remedies are not needed in intimate interactions as they are in the more hurried and impersonal relationships of the marketplace. n212 Although he seems confident that careful scrutiny will unmask the exaggerations and lies that lovers commonly tell about their personal qualities and prospects, Posner concedes [*423] that some highly material lies related to marriage -- in particular, the fact of a potential spouse's sterility -- cannot be uncovered even by the sharpest eye. Thus, he accepts as reasonable an exception to the self-help principle that would allow a misrepresentation of fertility to serve as grounds for divorce. n213

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n211 See Posner, supra note 207, @ 5.2, at 132.

n212 See id. (defending the common law rule that fraud is not a ground for dissolving a marriage, although fraud voids other types of contracts).

n213 See id.

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For several reasons, however, extending the "long courtship" rationale does not neatly dispense with the modern sexual fraud case. It is hard to accept Posner's premise that courtship offers better opportunities for reliable observation than do commercial dealings. n214 In both arenas of human interaction, people have reasons to be both trusting and suspicious of one another's representations. Yet in the marketplace, where protection against fraud is extensive, courts do not require the recipient of an intentional misrepresentation to investigate its truth. n215 Why does Posner favor more stringent standards of fraud regulation in the arena of unconstrained marketplace competition than in social settings, where more trusting interaction is the norm?

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n214 Posner's long courtship rationale also conflicts with changes in sexual practice. Many contemporary relationships become sexual very quickly, without a long period of courtship preceding the moment of sexual consent. Of course, individuals could choose to wait in order to permit the investigation that Posner envisions, but an equally defensible alternative is for the law to distribute the risks and consequences of not waiting more fairly between sexual partners. In addition, many of the frauds for which modern sexual fraud plaintiffs are suing are precisely the misrepresentations of fertility that Posner accepts as good ground for a fraud claim. For a discussion of relevant cases, see supra notes 123, 137-138 and accompanying text.

n215 See Restatement (Second) of Torts @ 540, 545A (1977); see also id. @ 545A cmt. b (stating that "the recipient of a fraudulent misrepresentation is not required to investigate its truth, even when a reasonable man of ordinary caution would do so before taking action").

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Social science research also refutes Posner's confident assertion that careful scrutiny will permit a potential lover to unmask a liar. The ordinary decisionmaking skills of everyday life do not protect us from deliberate lies; to the contrary, there is strong evidence of a shared human tendency to be implicitly trusting. Social scientists report that most people assume a speaker to be telling the truth. n216 Even a cautious or suspicious person who tries to guard herself against sexual lies may greatly overestimate her ability to detect them. The evidence indicates that we are generally poor at deciding whether someone is lying, even in face-to-face settings. n217 Add to these disadvantages a set of sexual mores that discourage explicit questioning as a prelude to a [*424] kiss, and self-help strategies in fact can do very little to prevent most sexual frauds. At best, self-help will unmask only the most inept liars, while doing little to expose more skillful dissimulations. As Kirstin Luker observes, it is far easier to study stock prospectuses or the performance rating of different models of automobile than to probe the credibility, character, or resources of a potential sexual partner. n218 Perversely, however, even though information resources are generally better in commercial than in sexual settings, so too are the legal remedies available to those who are misled. Something other than the possibility of effective self-help must underlie the law's current rules allowing more predatory behavior in intimate than in economic relations.

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n216 See Bella M. DePaulo et al., Effects of Importance of Success and Expectations for Success on Effectiveness at Deceiving, 17 Personality & Soc. Psychol. Bull. 14, 21 (1991).

n217 See Paul Eckman & Maureen O'Sullivan, Who Can Catch a Liar?, 46 Am. Psychologist 913, 913 (1991) (explaining that empirical evidence indicates that in all settings, people are not very accurate in judging when someone is lying, including even professionals whose jobs require them to make credibility judgments); see also Gerald R. Miller & Judee K. Burgoon, Factors Affecting Assessment of Witness Credibility, in The Psychology of the Courtroom 169, 184-86 (Norbert L. Kerr & Robert M. Bray eds., 1982) (citing studies demonstrating that people overestimate their ability to detect lies).

n218 See Kristin Luker, Taking Chances: Abortion and the Decision Not to Contracept 78 (2d ed. 1991).

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B. Feminist Skepticism

The theory of fraud highlights the troubled interdependency of self and community. Raised in brave defense of individual autonomy, an allegation of fraud contains within it a humbling admission of unwarranted reliance on another person. In consequence, the issue of fraud inevitably sparks highly charged debates over the values of individual autonomy and self-reliance on the one hand, and interdependence and protection of trust on the other. Raising these debates in a sexual context further roils the ideological waters by highlighting the tension between the ideal of sexual freedom and the limited range of sexual choices realistically available, particularly for women. Because these issues have been particularly important in the development of a feminist politics of sex, n219 the following section addresses specifically feminist theoretical concerns about the implications of the legal strategy proposed in this Article. I argue for consent as a means and sexual autonomy as the end of a feminist sexual politics, and offer what I hope will be a useful discussion of the difficult relationship between ideal and reality, and between female desire and vulnerability, in feminist sexual thought.

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n219 Although often associated with contemporary feminism, see Ann Ferguson, Sex War: The Debate Between Radical and Libertarian Feminists, 10 Signs 106, 106 (1984), the sexual politics debate reaches back into the nineteenth-century feminist movement. For an insightful effort to link two centuries of feminist sexual theory and several waves of feminist activism around sex, see Ellen C. DuBois & Linda Gordon, Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought, in Pleasure and Danger: Exploring Female Sexuality 31 (Carole S. Vance ed., 1984).

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1. Consent and Autonomy as Feminist Values. -- Feminists are among those most skeptical about the adequacy of liberal individualism as a moral or political model. n220 Despite that criticism, however, feminist [*425]

theory has not rejected the values of consent and autonomy so closely linked to individualism. Rather, feminist thinkers have found new roots for the notion of a self-governing female self within a relational framework, using communitarian principles to renew liberal ideals. n221 Throughout its history, feminism has consistently sought to enrich female personhood by demanding that women be accorded opportunities for growth and self-determination, along with the dignity and respect embodied in legal limits on sexual and reproductive coercion. The goals of protecting consent and promoting autonomy have been and remain defensibly feminist values. n222

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n220 Critics of liberal individualism argue that the ideal of the rationally self-interested person who realizes herself through separation from others ignores the inherently social nature of human beings and distorts the relationship between individual and community. See Alasdair MacIntyre, After Virtue 51-78, 205-25 (2d ed. 1984) (analyzing failure of enlightenment "project" to establish sustaining moral basis for social life and individual identity); Martha C. Nussbaum, Love's Knowledge, in Love's Knowledge: Essays on Philosophy and Literature 261, 274 (1990) (describing knowledge of love as "a complex way of being, feeling, and interacting with another person"); Charles Taylor, Sources of the Self 495-513 (1989) (arguing that personal autonomy and unfettered reason are intertwined with modern desire for expressive fulfillment and community identification); Michael J. Sandel, Justice and the Good, in Liberalism and Its Critics 167-76 (Michael J. Sandel ed., 1984) (analyzing failure of liberal conception of self and exploring moral potency of communitarian alternative). Other important critics of liberal individualism include feminists Carol Gilligan and Robin West, whose works emphasize connection over separation as most important for women's development and fulfillment. See Carol Gilligan, In a Different Voice 100, 166-74 (1982); Robin L. West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 Wisc. Women's L.J. 81, 139-43 (1987) [hereinafter West, Women's Hedonic Lives].

n221 See, e.g., Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 Yale J.L. & Feminism 7, 35-36 (1989) (arguing that autonomy requires not only respect for individual self-determination, but also recognition that social relations constitute the individual); Margaret J. Radin, Market-Inalienability, 100 Harv. L. Rev. 1849, 1904-06 (1987) (suggesting that personhood involves both separation from and interaction with physical and social context).

n222 "The basic value of autonomy is . . . central to feminism. Feminist theory must retain the value, while rejecting its liberal incarnation." Nedelsky, supra note 221, at 7.

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Within the sexual context, autonomy has three constituent aspects -- bodily integrity, sexual self-possession, and sexual self-governance. n223 Bodily integrity denotes the interest in maintaining secure physical boundaries, and includes a person's interest in controlling access to her body and sexuality. Sexual self-possession includes a person's interest in sexual self-expression through acts and with partners that satisfy her present desires and purposes. Nonconsensual sex is an act of bodily and sexual dispossession: the aggressor

appropriates the victim's body and sexuality for his own purposes. The third and final aspect of sexual autonomy -- sexual self-governance -- requires both bodily integrity and sexual self-possession for its realization, but it further requires that a person have the power to shape sexual expression in ways that support and advance her personality and life projects. [*426] Jennifer Nedelsky evokes the self-governance aspect of autonomy when she reminds us of "those rare moments when we feel that we are following an inner direction rather than merely responding to the pushes and pulls of our environment." n224

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n223 This schema derives in part from Bogart, supra note 168, at 121-23.

n224 Nedelsky, supra note 221, at 24.

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Efforts to strengthen the legal protection of sexual consent (like the tort proposal of this Article) address the first two of these three aspects of sexual autonomy. Requiring more than just a fiction of consent in sexual relations would dramatically improve existing legal protections for women's sexual security and integrity. But consent alone, no matter how substantively defined or scrupulously defended, cannot assure women the creative power of sexual self-governance. n225 Meaningful standards of sexual consent place control over a woman's sexuality in her own hands, but owning her own sexuality does not assure that she will have the power to use or enjoy it in her own best interests.

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n225 Catharine MacKinnon observes that consent is supposed to operate as "women's form of control over sexual intercourse." The inadequacy of this form of control is that "this model does not envision a situation the woman controls . . ., [y]et the consequences are attributed to her as if the sexes began at arm's length, on equal terrain, as in the contract fiction." Catherine A. MacKinnon, Toward a Feminist Theory of the State 174 (1989).

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This limitation stems from existing sexual practices and values, which deeply compromise women's capacity to make choices that enhance their sexual autonomy in the fullest sense. Even if coercion into sex by force or fraud could be entirely avoided, complex and contending forces overshadow personal choices about sexual activity for both women and men. n226 The larger culture remains ambivalent about nonmarital sex, and either explicitly or implicitly associates "illicit" sex with personal and social disorders. Heterosexual relations involve people of differing power, yet conventions of masculinity and femininity are currently in the midst of dramatic and sometimes confusing change. The prevailing conventions of romance discourage people from speaking frankly before sex about their relational expectations. n227

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n226 The following paragraphs describing "how we have sex" are based on Kristin Luker's sensitive and nuanced account, Taking Chances: Abortion and

the Decision Not to Contracept. See Luker, supra note 218. Luker's book explores the reasons why women decide to have sex without contraception when they do not wish to be pregnant. On the basis of abortion clinic interviews with a large and diverse group of women who risked unprotected sexual intercourse (and then sought to abort the resulting pregnancies), Luker explores women's conflicted decisionmaking about sexual intimacy. Use of contraception was clearly in the best interests of the women whom Luker interviewed (that is, the choice that would have furthered their sexual autonomy interests), but was set aside because of other relational and social constraints. See id. at xi-xii, 46, 137. Luker's study of the forces that constrain and impede women's sexual choices is thus helpful in understanding the relationship between the rhetoric of consent/choice and real issues of women's autonomy in the sexual realm.

n227 See id. at ix, 78.

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Sexual choices for a woman are further complicated by the fact that [*427] taking care of herself conflicts with a barrage of cultural messages defining what a "good woman" is (and does in bed). Ironically, a woman who treats herself with sexual respect tends to appear less "respectable" to men. n228 In order to be sexually self-respecting, a woman must be sexually assertive rather than passive; frank about her own sexual needs as opposed to waiting for a lover to arouse her "smoldering desire;" rational rather than "swept off her feet;" and willing to seek pleasure for herself rather than only for her partner. n229 Yet such sexually self-regarding behavior can be very costly for women judged to be too calculating, too sexually experienced, or too hard-headed in sexual bargaining. Men tend to court such women with less respect, and to feel less responsibility for sexual consequences with women perceived as self-reliant. n230 Women are highly and positively rewarded for being available to men, for desiring to please men, and for identifying their self-esteem and well-being with male sexual desire and approval. n231 Ironically, sexual vulnerability becomes one way to be a "real" woman who is able to evoke in a man the traditionally masculine roles of duty and protectiveness. n232 Despite notable advances in recent decades by an elite group of American women, persistent economic dependency and tenacious traditional sex roles continue to make connection to a man an important avenue to a stable and secure life for many women. n233 [*428] These conflicting pressures mean that women in sexual relationships (including those as brief as a single encounter) must try to manage a number of complex tasks -- some of which advance, but many of which undermine, their sexual autonomy.

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n228 See id at 47, 51.

n229 See id. at xi-xii. Interestingly, this story of the woman passively waiting for permission to be aroused by a man, sexually responsive rather than assertive, emotional and self-sacrificing rather that self-directed and insistent about her own sexual pleasure, is the image of heterosexual sexual relations in the enormously popular genre of romance novels. See Ann Barr Snitow, Mass Market Romance: Pornography for Women is Different, in Powers of Desire: The Politics of Sexuality, 245, 250-54 (Ann Barr Snitow et al. eds., 1983).

n230 See Luker, supra note 218, at 49.

n231 See id. at 66. It is too simplistic to identify women's sexual subordination to men with painful abuse and repression alone; there are also rewards and advantages for women in learning to work with what the culture offers them. Cf. 1 Michel Foucault, The History of Sexuality: An Introduction 23-30 (Robert Hurley trans., Vintage Books 1990) (describing "productive" effect of power as a means of disciplining sexuality, creating rather than repressing sexual desire). Yet even if we acknowledge that women are rewarded for success in traditional female roles, feminists must nonetheless ask whether the price women have paid for this sexualized respect has harmed them, and why women have had to work so hard for what amounts to so little esteem.

n232 See Luker, supra note 218, at 66. For a woman raised to accept the traditional female role of compliance, self-effacement, nurturance and dependency, the demand that she rely on herself rather than on a man can be frightening and difficult. Vulnerabilities prompted by ambivalence about sexual roles are likely to be strongest in older women, raised to expect and fulfill traditional female roles and in younger women -- the self-defined "postfeminist" generation -- who expect the benefits of political and economic equality with men, but fear labelling themselves "feminists," an identity they associate with self-defeating anger, personal unattractiveness, and an inability to get along with and please men. See Paula Kamen, Feminist Fatale: Voices from the "Twentysomething" Generation Explore the Future of the "Women's Movement" 23 (1991).

n233 Women living without men, particularly unmarried mothers, are the very poorest people in our society. See Victor R. Fuchs, Women's Quest for Economic Equality 86 (1988). Sexual attractiveness remains very important to female self-esteem, even though women are increasingly skeptical about the wisdom of resting their self-regard on male approval. See Naomi Wolf, The Beauty Myth 1 (1990).

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In wanting more for women than acquiescence in their present sexual constraints, feminism places itself into intellectual tension with liberal understandings of consent and choice. Liberalism as a political theory and tradition defends (indeed, celebrates) the freedom of individuals to define their own satisfactions through self-interested choices. n234 Yet liberal thought frequently treats the mere presence of a choice as a sufficient moral justification for otherwise unjust, degrading, or exploitative relationships. Thus, any voluntary circumstance in which an individual may find herself is morally defensible to the liberal, simply because the individual consented to it. n235 Further inquiry into either the circumstances of that consent or its consequences implies disrespect for the individual who chose her situation. n236 By the same token, the use of governmental or communal power to intervene in bad or unjust relationships risks opening the door to authoritarian government n237 [*429] or paternalist assertions of power. n238

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n234 See, e.g., Lawrence M. Friedman, The Republic of Choice 27 (1990) (arguing that enthronement of individual choice is the central theme of American legal and political culture).

n235 This claim rests on a vision of human nature as rational (people are able to calculate where their own well-being lies), as well as self-interested (people can be relied upon to make only those choices that will advance their own best interests). Thus, all voluntary transactions are presumably good for the parties involved. This presumption that voluntary transactions are "wealth-maximizing," however, arguably collapses in situations that involve greater moral and psychological complexity. As Robin West argues in challenging the consent theory of Richard Posner: "It does not follow from the fact that coerced states are immoral by virtue of their coercive element that voluntary world states are of positive moral value by virtue of their voluntariness." Robin West, Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner, 99 Harv. L. Rev. 384, 427 (1985) [hereinafter West, Authority, Autonomy, and Choice]. An exchange between West and Posner appears in Posner, supra note 180, and Robin West, Submission, Choice, and Ethics: A Rejoinder to Judge Posner, 99 Harv. L. Rev. 1449 (1986) [hereinafter West, Submission, Choice, and Ethics].

n236 See West, Authority, Autonomy, and Choice, supra note 235, at 386 (observing that liberal conception of consent serves to "validat[e] otherwise unappealing states of affairs"); West, Women's Hedonic Lives, supra note 220, at 88 (noting that "liberal legalism assumes that, if free to do so, people will choose what will make them happy, and that therefore there exists a correlation between the objective act of consent and a subjective gain in happiness").

n237 See Posner, supra note 180, at 1446-48 (asserting that skepticism about free choice is at best "Utopian" and at worst risks the "iron hand" of authoritarian government).

n238 The public advocacy stance of pro-choice feminism, for example, has insisted on a woman's right to choose abortion as foremost, and tended, out of the fear of losing reproductive choice to men, family, or community, to resist moral examination of how particular women exercise that choice. Discussing the abortion issue, Catharine MacKinnon writes: "We have not been able to risk thinking about these issues on our own terms because the terms have not been ours, either in sex, in life in general, or in court." Catharine A. MacKinnon, Roe v. Wade: A Study in Male Ideology, in Abortion: Moral and Legal Perspectives 45, 46 (Jay L. Garfield & Patricia Hennessey eds., 1984). Feminism's uncharacteristically staunch neutrality about women's choices to abort is noted in Kathryn Abrams, Ideology and Women's Choices, 24 Ga. L. Rev. 761, 788-89 (1990).

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Apart from any affirmative belief that lying to a sexual partner is good, fair, or even defensible, this choice rhetoric strongly biases lawyers and judges against the theory of sexual fraud. In the liberal moral calculus, the fact that the defrauded person chooses to have sex weighs far more heavily than either the hollowness of a choice made under false pretenses or the gravity of any resulting harm. The status quo is justified by blaming victims for "choosing" the otherwise morally troubling sexual circumstances in which they find themselves, and the core moral issue of the obligations that sexual partners owe to each other is thereby avoided.

Rejecting this tendency, some feminist critics have instead characterized the presence of formal consent as only one element of a more textured theory of

relational justice. n239 The mere fact of a sexual choice does not mean that a particular sexual encounter is good for the woman involved, or that her consent creates a relationship that either the government or the community should tolerate. n240 For example, a [*430] woman might consent to become a sexual slave, n241 yet choice rhetoric affords no basis for questioning her controversial choice. But if, in addition to consent, we also value an individual's power to shape sexual expression in ways that support and advance her identity and life projects, the legitimacy of such a choice can be challenged. Kathryn Abrams suggests, for example, that a woman's desire for the approval, respect, and esteem of her community may cause her to value too highly the social costs of male disapproval or rejection exacted from women for sexually self-regarding behavior. n242 In a similar vein, Robin West argues that women may give greater weight to men's sexual interests than their own out of "fear of acquisitive and violent male sexuality." n243 Deference to and even eroticization of men's sexual dominance may become a woman's means of protecting herself from physical danger and psychic diminishment. n244 For these and other reasons (including coercion by force or fraud), women may make "bad" sexual choices.

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n239 Notable feminist critiques of the traditional choice model include Abrams, supra note 238, at 763-72 (discussing impact of deterministic theories on traditional choice model); Alice Kessler-Harris, Equal Employment Opportunity Commission v. Sears Roebuck and Co.: A Personal Account, 35 Radical Hist. Rev. 57, 68, 72 (1986) (analyzing interdependence of female socialization and persistence of predominantly female job categories); Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749, 1757-58, 1787-89 (1990) (criticizing judges' acceptance of arguments that workforce sex segregation results from women's voluntary choice); West, Submission, Choice and Ethics, supra note 235, at 1449-56 (denying that threat of state oppression requires unqualified respect for individual choice); Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. Rev. 1559, 1562-72 (1991) (asserting that social constructions of gender narrow women's options); Lucinda M. Finley, Choice and Freedom: Elusive Issues in the Search for Gender Justice, 96 Yale L. J. 914, 931-40 (1987) (arguing that "socially constructed notions of gender" shape women's choices) (reviewing David L. Kirpet al., Gender Justice (1986)). Deborah Rhode comprehensively reviews challenges to the liberal understanding of choice in Deborah L. Rhode, Justice and Gender 165-67 (1989).

n240 See West, Authority, Autonomy, and Choice, supra note 235, at 399 ("[T]he consensual bargain that underlies commerce, labor, and sex may save those transactions from being theft, slavery, or rape, but it hardly accords them positive moral value.").

n241 The example is J.H. Bogart's. See Bogart, supra note 168, at 123.

n242 See Abrams, supra note 238, at 788.

n243 West, Women's Hedonic Lives, supra note 220, at 94.

n244 See id. at 96, 116-17.

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Both Professors Abrams and West depict women's sexual choices as rational in light of present constraints, but nonetheless troubling from the perspective of sexual autonomy. This is the key difference between feminist and liberal defenses of consent and choice: To describe women's priorities as appropriate in a particular context is distinct from the liberal position that broadly validates all women's choices. n245 Thus feminists are at odds with liberals over the ideological role of consent, even though they share the strong liberal commitment to consent as an important guarantor of autonomy and personhood.

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n245 See Christine A. Littleton, Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women, 1989 U. Chi. Legal F. 23, 27.

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Feminist theory must "uncouple" consent from liberal choice rhetoric by valuing sexual consent on normatively feminist grounds -- specifically, for the gains in autonomy and the chance for improving women's well-being that come with the freedom to make sexual choices. From this normative perspective, consent is a moral good because having power to shape one's own life is better than not having it, and because some sense of a capacity to direct one's life is necessary for the self to flourish. n246 Although the possibility of choice is always better [*431] than the absence of choice, the mere possession of power to choose does not automatically legitimate all of the consequences that flow from its exercise. Thus, feminists who value consent need not be trapped into agreeing that women in exploitative, degrading, or dependent (but formally consensual) sexual relationships are better off. It does assume that women who possess the power of sexual consent, even if ill-used in the present, retain the possibility for future autonomy: A woman without the power to say "no" to others is forever denied the satisfaction of saying "yes" to herself. The argument of this Article rests on these more modest moral claims for consent as a feminist value.

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n246 Martha Nussbaum argues that "practical reason" -- the desire of individuals "to participate (or try to) in the planning and managing of their own lives, asking and answering questions about what is the good and how one should live, . . . [and] . . . enact[ing] their thought in their lives" -- is a requirement of good human life. See Martha C. Nussbaum, Human Functioning and Social Justice: In Defense of Aristotelian Essentialism, 20 Pol. Theory 202, 219 (1992). Nussbaum maintains that "a being who altogether lacks this [capacity for practical reason] would not be likely to be regarded as fully human in any society." Id.; accord Martha C. Nussbaum, Non-Relative Virtues: An Aristotelian Approach, 13 Midwest Stud. Phil. 32, 45-49 (1988) (defending the possibility of identifying human needs shared by all persons across cultures).

Feminist theorist Robin West expresses deep skepticism about the value of consent, raising doubts about whether consent has any necessary connection to autonomy. See West, Authority, Autonomy, and Choice, supra note 235, at 399. West comments that authoritarian and submissive strains in human psychology

make it at least questionable whether consent is "an attractive value worth encouraging in human affairs." Id. at 390. She points out that people not only regularly consent to fates over which they have no control, but they may consent in order to gratify a desire to submit to persons in power. See id. at 427. West believes that this may be particularly true of women in sex: "[W]omen report -- with increasing frequency and as often as not in consciousness -- raising sessions -- that equality in sexuality is not what we find pleasurable or desirable. . . . [but rather] the experience of dominance and submission that go with the controlled, but fantastic, 'expropriation' of our sexuality." West, Women's Hedonic Lives, supra note 220, at 116-17. In the preceding discussion of the feminist justifications for a consent strategy, I have been guided by West's criticisms of the moral claims that liberalism makes for consent. In her expression of more thoroughgoing doubts about consent as a moral good, I do not understand Professor West to oppose efforts to strengthen women's sexual consent; to my reading, she merely emphasizes that a consent strategy risks overlooking the socially constructed character of sexual desire, as well as the cultural constraints on sexual choice.

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2. The Double Bind. -- Choice rhetoric may be used not only to blame individual women for their sexual circumstances, but also to suggest that women as a group are not capable of exercising full powers of sexual autonomy. By admitting the possibility of being fooled in sexual dealings, does the sexual fraud theory imply that women are not tough enough or smart enough to take care of themselves? n247 Judith Walkowitz, based on her study of the Victorian feminist campaigns for sexual reform, warns contemporary feminists to learn a lesson from history:

Reliance on an iconography of female victimization can undercut the political import of feminists' own public initiatives. As publicists and political actors, [feminists] need to take care not [*432] to play into the hands of the forces of political reaction, who are only too delighted to cast women in the roles of victims requiring more protection and control, and who desire to turn feminist protest into a political repression. n248

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n247 A persistent issue in debates over sexual equality is whether women are less rational than men, and thus not fully competent to make their own sexual choices independent of male "protection." Since the Enlightenment, women have been regarded as lacking the capacity for higher-order, abstract intellectual thought, and thus as particularly susceptible to irrational emotion. See Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 804 (1989).

n248 Walkowitz, supra note 75, at 244-45.

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Taking such warnings to heart, some feminists fear that any (purposeful or unintended) reinforcement of negative images of women as sexual victims will be used to strengthen paternalist claims that women should be denied sexual freedom "for their own good."

This tendency to equate regulation with repression has strongly influenced feminist sexual politics in the twentieth century. n249 Since the 1980s, however, the sharpening critique of choice rhetoric has exposed for feminists the inadequacies of a purely libertarian approach to sexual regulation. Although an interventionist strategy risks suffocating sexual "protections," relying on "freedom of choice" rhetoric masks both the overt and subtler constraints on women's sexual agency. Coming to grips with this theoretical "double bind" n250 has proved difficult for feminists, resulting both in paralysis n251 and balkanization n252 of feminist sexual politics. Neither regulation nor deregulation of sexual relations appears to be a "safe" strategy from a feminist perspective. But if women are forced to choose, which option represents the greatest threat to their sexual autonomy? Feminists who most fear the unconstrained private power of their sexual partners have been willing to risk greater sexual regulation, while those who most fear governmental scrutiny and repression have preferred to take their chances in the sexual free market.

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n249 See supra part I.A.2.-3.

n250 Margaret Radin uses the term to express the realization that in a world marked by sexual injustice, any feminist strategy for change will have some bad consequences for women. Feminists must pragmatically choose the best among imperfect choices, and then keep rethinking and rechoosing as the surrounding social hierarchy shifts. See Margaret J. Radin, The Pragmatist and the Feminist, 63 S. Cal. L. Rev. 1699, 1699-1701 (1990).

n251 See Smart, supra note 185, at 5.

n252 See Ferguson, supra note 219, at 107 (describing split between "libertarian" and "radical" or pro-regulatory feminists). Both camps of feminists embrace a similar political critique of current conditions of female sexuality, and both demand a positive reconstruction of female sexual autonomy. Radical feminists, however, have hesitated to assert an idea of female sexual subjectivity under a "freedom of choice" banner, regarding this notion as too corrupted by links with women's degradation to foster female liberation. By contrast, liberal feminists have relied on essentialist theories of sex as inherently good, pleasurable, and liberating, while deemphasizing women's actual experience of sex as an occasion for political oppression and personal suffering. See id.

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Rethinking the politics of sexual regulation from a feminist perspective means above all rejecting this either-or choice between Orwellian oppression and the Hobbesian jungle. Women are desiring sexual subjects who nonetheless live under social conditions of unequal status and power that put them at risk of injury in their pursuit [*433] of sexual self-fulfillment. Neither mainstream liberal n253 nor conservative n254 sexual thought acknowledges the paradox of women's sexual reality, ignoring either women's desire or women's danger in their prescriptions for sexual regulation. Because neither existing approach to sexual politics is fully adequate for feminist purposes, n255 feminists must theorize and strategize from their own subjective experience and empirical reality.

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n253 Current liberal thought tends to deny that there are meaningful differences between men and women and attempts to advance women by giving them all (but nothing more than) the rights that men have. See Alison M. Jaggar, Feminist Politics and Human Nature 35-39 (1983). In sex, the liberal goal is to allow women to participate as men do by loosening the traditional legal and social controls on women's sexual expression. See, e.g., Brief Amicus Curiae of Feminist Anti-Censorship Task Force et al., American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147). The Feminist Anti-Censorship Task Force argues that women's sexual interests are not served by anti-pornography legislation: "The range of feminist imagination and expression in the realm of sexuality has barely begun to find voice. Women need the freedom and the socially recognized space to appropriate for themselves what has traditionally been a male language." Id. at 31. For the same reasons, liberal feminist thinkers have concluded, for example, that the nineteenth-century feminist movement erred when it compromised female sexual pleasure in order to protect women from sexual danger, as during the moral reform campaigns against seduction and prostitution. See DuBois & Gordon, supra note 219, at 32.

n254 The campaign for "family values" reflects the latest resurgence of arguments for a paternalist sexual regime. Cultural conservatives (including many whose political commitments are otherwise liberal) stress the morally perilous nature of sex, a premise that lends ideological support to legal and cultural repression of sexual freedom both for men and women, but particularly of women's sexuality. Cf. Allan Bloom, The Closing of the American Mind 100-01, 104-05, 124 (1987) (asserting that feminism has triumphed over the family, suppressing modesty, rearranging sex roles, and encouraging extra-marital sex and child-bearing by women); George Gilder, Men and Marriage 61-66 (1986) (declaring that women's increasing reluctance to marry endangers men's welfare); Sylvia A. Hewlett, A Lesser Life: The Myth of Women's Liberation in America 184-90 (1986) (characterizing feminism as hostile to motherhood and familial happiness). Despite the rhetorical power of these polemics, however, many conservatives oppose greater legal intervention based on an unwillingness to validate legal intervention as a means to redistribute power (including sexual power) in the society. See Stephen B. Presser, Above and Beyond Strict Liability: Critical Legal Studies and Feminist Approaches to the Law of Torts, in Pernicious Ideas and Costly Consequences: The Intellectual Roots of the Tort Crisis 63, 78 (1990).

n255 Nor, as I hope my history of feminist campaigns for and against seduction laws suggests, can either be rejected as definitionally "anti-feminist."

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The initial move towards a distinctly feminist sexual politics is to choose feminist political strategies from a material rather than an idealistic basis, denying no part of women's sexual existence and focusing on pragmatic rather than symbolic gains and losses. n256 This pragmatic [*434] attention to substance rather than symbolism will often require feminist support for interventionist sexual regulation. A libertarian "hands-off" approach, which might arguably serve women well once sexual equality has been substantially

achieved, is not necessarily the best strategy for the present moment. n257 During the transition to greater sexual autonomy for women, the resistance to sexual stereotypes, which partly drives feminist fears about sexual regulation, can operate as a dangerous form of idealistic blindness to the social conditions that harm women. The feminist goal of sexual autonomy envisions a woman choosing, enjoying, directing, and interpreting her own sexuality for her own purposes. But many women currently do not have the social authority to enforce this ideal. The goal of feminist sexual regulation should not be to make a woman's sexual choices for her, but to give her greater power to enforce her own choices. When a proposed sexual regulation does not limit the range of sexual choices available to an individual woman, but instead reinforces her power to choose for herself, feminists should support that use of state power. The tort of sexual fraud proposed in this Article meets these criteria.

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n256 Mary Coombs has criticized the impractical idealism of the feminists involved in the anti-heartbalm campaigns of the 1930s. See Coombs, supra note 35, at 14. Coombs observes that feminists of that era saw sexual tort "as an ideological impediment to woman's social progress; the plight of the particular plaintiffs was largely invisible to them." Id. She speculates that feminists might have been less committed to the anti-heartbalm movement (and more responsive to the position of less privileged women invested in the heartbalm actions) had they "recognized that their vision of an independent, sexually equal woman was only an ideal." Id. at 15. Instead, many anti-heartbalm reformers hopefully believed that female liberation already had been achieved, and on this premise they supported deregulation of the sexual realm, including abolition of seduction.

n257 Littleton, supra note 245, at 23. Littleton asserts that the task of feminist lawyers is to develop strategies to move women in the direction of the tentative ideal while minimizing the dangers of partial reform. In a sexually-stratified society such as ours, she argues, formal notions of equality often produce distortions that perpetuate rather than remedy inequality. See id.

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A second move towards a feminist politics of sexual regulation should ask: To what extent has the received wisdom exaggerated the dangers of being co-opted by any recourse to state power? Proposals to use common-law causes of action for social change come into conflict with an entrenched belief that the common law is deeply conservative n258 and that the transformative potential of any new common law theory will thus be subverted by enforcement decisions that replicate rather than replace existing hierarchies. Such warnings come both from libertarians, who fear that government abuse of power is inevitable, and postmoderns, who caution that simply by accepting the law's terms feminists already have conceded too much to a discourse of male power. n259

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n258 See generally Stanley N. Katz, The Politics of Law in Colonial America in Law in American History (Donald Fleming & Bernard Bailyn eds., 1971)(explaining historical origins of populist American belief that common law is innately conservative).

n259 See, e.g., Smart, supra note 185, at 5. Catherine MacKinnon in particular has been critical of the inherent conservatism of the common law: "Standard legal doctrine in the area[] of tort . . .[,] which could have moderated the extremes of conventional role expectations when they restrained and damaged women[,] has, on the whole, institutionalized them." Catherine A. MacKinnon, Sexual Harassment of Working Women 158 (1979).

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I urge feminists to critically reexamine this resistance to using the [*435] law to change sexual norms. Such unqualified skepticism of legal power is paralyzing; worse, it consigns women to an existence outside of civil society, cut off from the system of public justice. Whereas distinctly feminist artistic and cultural perspectives have evolved, as Dawn Currie points out, there is no "alternative" law or legal process in which feminist legal scholars can build a transformative counterculture. n260 To change the law, feminists have no choice but to engage the law where it is. Further, such determined skepticism may ignore real gains made over time in women's political power -- gains that expand the material base of possibilities for feminist change. When women have little or no political power, perhaps it is inevitable that feminist legal reforms will be co-opted for anti-feminist ends. This argument explains, for example, women's discouraging experience with both paternalist and libertarian sexual regimes: Victorian society sought to protect women from sexual exploitation, but only at the price of female sexual autonomy; the Sexual Revolutions of the 1920s and of the 1960s and 1970s rediscovered female sexual agency, but only under conditions that made it hard for women to say "no" as well as "yes" to sex. Throughout U.S. history, whether the ideological emphasis has been female passionlessness or female passion, sexual reform movements to which feminists were committed have in some ways reinforced female subordination and dependency.

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n260 See Dawn H. Currie, Feminist Encounters With Postmodernism: Exploring the Impasse of Debates on Patriarchy and Law, 5 Canad. J. Women & L./Revue Femmes et Droit 63, 81 (1992).

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As women gain political power, however, the dangers of being co-opted should naturally decrease. Although it is undeniable that women today hold far less than their rightful share of political power, their presence in the legislatures, courts, and enforcement offices is growing, as is women's political influence as voters and opinionmakers. n261 If women possess any meaningful measure of political power, feminists are [*436] obliged to rethink their strategies for change from the perspective of those who are at least partially enfranchised. If women are among those who can use government power (rather than simply be used by it), legal strategies to strengthen women's autonomy are no longer politically unthinkable, even for the most serious skeptic. Empowering women through law need not automatically reproduce a politics of sexual determinism or paternalism. Rather, it may create the arena in which new sexual norms more conducive to autonomy and mutuality begin to take concrete shape.

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n261 By pointing to the fact of women's gathering strength as a political force, I do not wish to obscure how partial those gains are. Despite women's formal inclusion in the polity and the economy, women are poorer than other Americans, they are underrepresented in governing political bodies and in centers of economic and intellectual power, and their interests and needs are ranked unjustifiably low on the list of social priorities. See Fuchs, supra note 233, at 86. Even after the unprecedented 1992 electoral victories by women, the membership of the 103d Congress is barely more than ten percent female (six of 100 senators, and 48 of 439 representatives). A single woman justice (the first and only woman ever appointed) now sits on the Supreme Court. No woman has ever served as President. Thus, none of the three branches of the federal government comes near to proportionately representing the female majority of the population. A telling measure of the marginality of women's needs on the national policy agenda is the long-standing pattern of grossly disproportionate government funding for medical research into diseases that primarily affect women, such as breast cancer. See Working on a Cure for Unequal Medicine, L.A. Times, June 9, 1992, part E, at 1.

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3. Towards Sexual Personhood. -- The feminist critique of liberal choice rhetoric shows that strengthening consent is, by itself, not enough to assure women's sexual autonomy. Consent is a means to autonomy, but not its substance. Consent enhances women's sexual autonomy when the broader social context of relationships, practices, and values is receptive. The important question for feminists, then, becomes how to identify such pro-sex and pro-woman social and relational settings.

One pragmatic way to imagine such a world is to look to examples of other practices that encourage autonomy. n262 The settings in which people feel more autonomous have varied over time and across cultures, and evaluating feelings of individual efficacy and self-creation is a complex task. But methods of reasoning from personal and social experience have deep roots in feminism. For example, historical experience shows that autonomy is destroyed by subjection to the abusive or arbitrary power of others, and that it is a particular insult to personhood [*437] not to own or control one's own body. The movements to end both African-American slavery, coverture and rape in marriage, and women's political disenfranchisement have rested on these same experiential insights about what respect for personhood feels like. n263 In this generation, feminists have wielded the same arguments to oppose tolerance for rape, incest, sexual harassment,and other forms of sexual abuse, confident from experience that in doing so they were advancing women's well-being. Consent to the use of one's body is a powerful symbol of social respect for the individual, and the failure to give full force to sexual consent conveys deep disregard for personhood. n264 Reflecting this interest in bodily self-possession, the right to make decisions with significant implications for bodily integrity has long been recognized within our jurisprudence as a fundamental constitutional right. n265 So, too, this Article's proposal to regulate sexual [*438] fraud rests on an understanding that protection from nonconsensual sex is integral to authentic personhood.

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n262 See Nedelsky, supra note 221, at 26. Using this approach, Martha Chamallas has articulated a "mutuality" or positive consent standard for sexual relations. See Chamallas, supra note 114, at 836. Under a mutuality standard, the determinative question becomes "whether the target would have initiated the encounter if she had been given the choice." Id. Only if a woman would positively choose to participate (and not, for example, decide only not to resist) is the sexual interaction approved. Chamallas concludes: "By redefining consent to mean welcomeness from the target's viewpoint, we can begin to incorporate the interests of women in the formulation of a legal standard." Id. Such efforts to reconstruct the sexual realm and sexual relations are needed to realize fully the third aspect of sexual autonomy for women -- sexual self-governance.

Other writers have proposed alternative sources of guidance in nurturing individual autonomy. Adopting a perspective congenial to the emphasis of feminism on women's subordination, William Galton suggests that the beginnings of an "objective account of well-being" can be found in "a deep common experience of the bad." William A. Galston, Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State 168 (1991). We understand that wanton cruelty, slavery, poverty, malnutrition, vulnerability, and humilation are bad, Galston argues, even lacking a fully expressed account of the good. See id. Linda Hirshman finds in literature another "source[] of knowledge from which judgments about morality come, and an important participant in the dialogue from which a moral tradition is formed." Linda R. Hirshman, Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges, 137 U. Pa. L. Rev. 177, 199 (1988). Hirshman retells the Jane Eyre story as a vehicle for dramatizing the connection between abortion and women's autonomy. See id. at 209-17.

n263 The nineteenth-century antislavery movement located the immorality of the system of African-American slavery in the personal domination of the slaveholder over the enslaved, a domination that sought to transform the enslaved into "the mere extension of his master's physical nature" and will. David Brion Davis, The Problem of Slavery in the Age of Revolution, 1770-1823, at 561 (1975). This vision embodied in law and social practice that the master dominated over the spirit or will of the enslaved person -- even more than the degree of cruelty or benevolence of masters and mistresses -- appears as the essential moral crime of slavery. See Orlando Patterson, Slavery and Social Death: A Comparative Study 8 (1982). Professor Patterson argues that it was the erasure of the enslaved person as a legal, economic, or personal subject -- not that persons were made the object of property rights held by others -- that made "the slave . . . a slave." Patterson, supra, at 8.

The aspiration for freedom from enslavement of the body was central to nineteenth-century feminist political thought. See Elizabeth B. Clark, Self-Ownership and the Political Theory of Elizabeth Cady Stanton, 21 Conn. L. Rev. 905, 917, 930-31 (1989). Physical integrity was seen as the root of moral and political self-possession, see id. at 905, and feminists sometimes spoke of women's lack of bodily integrity within common law marriage as a form of social death. "Where are you[,] Susan[,] and what are you doing?" wrote Elizabeth Cady Stanton to Susan B. Anthony after a long silence in their correspondence. "Are you dead or married?" Letter from Elizabeth Cady to Susan B. Anthony (Jan. 1856), quoted in Ellen Carol DuBois, Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869, at 28 (1978).

n264 The priority of bodily security, even over the sanctity of property, can be traced back at least as far as John Locke, the foundational philosopher of the liberal political order: "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person." John Locke, Two Treatises of Government 287 (Peter Laslett ed., student ed. 1988) (3d ed. 1698). When women were incorporated into the social contract by being granted political and legal equality, they too gained the right to claim the sovereignty over their own bodies that Locke describes as an essential attribute of personhood.

n265 The fundamental right of privacy has been interpreted to guarantee broad (but by no means unrestricted) liberty to make personal decisions about the security, sexuality, and reproductive powers of one's body. Compare Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992) (holding that Fourteenth Amendment protects individual decisionmaking and limits state intervention in areas fundamental to personal autonomy, including contraception, procreation, marriage, and child-rearing) with Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (construing constitutional privacy right to permit prosecution of homosexuals under state anti-sodomy statute).

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C. Privacy and Sexual Freedom

If stronger legal protection of strengthened sexual consent would be good for women, would it also be good for sex? My argument in this Article is not simply that sexual fraud would advance feminist ends, but also that creating and supporting expectations of fairness and honesty between sexual partners would increase the quality (and perhaps even the quantity) of sexual interaction. Consensual sexual activity gives people intense pleasure and happiness, and is also a foundation for deeper connections between people. Sex is thus good for the individuals involved, and for society as a whole. Yet sexuality is often portrayed as a fragile thing, easily squelched by the intrusion of prying eyes or unwelcome moralities. Some commentators bemoan the law's increasing intrusions into sexual practice as foreshadowing "the end of love and laughter." n266 Civil libertarians have supported a libertarian approach to sexual regulation as the "pro-sex" position, arguing that places of sexual encounter must be sheltered from government invasion and that individuals must be left free not to have to account to anyone else for their sexual choices. n267 Liberals fear that in politicizing sex, feminists have foolishly aligned themselves with the anti-sex forces of the conservative right and are endangering hard-won sexual freedoms cherished by both women and men. n268

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n266 See Naomi Wolf, Feminist Fatale, The New Republic, Mar. 16, 1992, at 23, 25 (characterizing resistance to greater sexual regulation).

n267 Cf. Ruth Gavison, Privacy and the Limits of Law, in Philosophical Dimensions of Privacy: An Anthology 346, 358 (Ferdinand D. Schoeman ed., 1984) (asserting that claims for decisional privacy really are claims for protecting liberty of action against communal and state interference).

n268 My opposition of the terms "feminist" and "liberal" is too general in that a significant number of feminists have aligned themselves with liberals

hostile to sexual regulation. See Ferguson, supra note 219, at 106-09 (describing "libertarian" strain of feminist sexual politics). Feminists against sexual regulation argue that women, whose sexuality is already deeply stigmatized and repressed, have more to lose from erosions of sexual freedom than they have to gain from increased protections against sexual violence and coercion. See Alice Echols, The Taming of the Id: Feminist Sexual Politics, 1968-83, in Pleasure and Danger, supra note 219, at 66. In addition, many lesbians and gays fear that the erosion of sexual privacy will lead to intensified persecution of vulnerable sexual minorities. See Gayle Rubin, The Leather Menace: Comments on Politics and S/M in Coming to Power: Writings and Graphics on Lesbian S/M 194, 194-95 (SAMOIS ed., 3d ed. 1987); Thomas, supra note 36, at 1457-60 (rejecting liberal construction of privacy while defending broad protections for expression of gay and lesbian sexuality and identity); see also A Vindication of the Rights of Whores 144-97 (Gail Pheterson ed., 1989) (reporting similar fears among prostitutes).

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The argument that sexual matters are private carries with it the [*439] implication that sexual relations are not political. The prevailing notion of sexual privacy presumes a social geography in which the realm of personal relations is literally a world apart from politics and the marketplace. The public and private realms operate according to different principles of justice, each with a morality suited to its setting. The choice not to publicly regulate a sphere of society amounts to a choice to cede governance of that sphere to private regimes of power. Thus the public-private split has meant that the public sphere enjoys democratic governance, while the private sphere is dominated by a hierarchy of gender roles in which privacy shields women's subordination. n269 Jean Bethke Elshtain has written that "a thinker's views on women serve as a foundation that helps to give rise to the subsequent determinations he makes of the public and the private and what he implicates and values in each." n270 The converse is true as well: Claims about the proper scope of sexual privacy cannot be separated from an underlying vision of the proper role of women as sexual beings. n271 Although modern political values purport to include women in the public world, the persistence of the idea that sexuality is quintessentially private (and thus outside the proper spheres of state and communal regulation) effectively rules out feminist demands that political principles of justice should extend to intimate relations between the sexes. n272 By identifying family and personal relations as private, the liberal state has maintained an official regime of sexual equality even as a private regime of male sexual authority has persisted beyond the public eye. n273

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n269 See Carole Pateman, Feminist Critiques of the Public/Private Dichotomy, in Public and Private in Social Life 281, 282-87 (Stanley I. Benn & Gerald F. Gaus eds., 1983); Susan Moller Okin, Justice, Gender, and the Family 14 (1989).

n270 Jean Bethke Elshtain, Public Man, Private Woman: Women in Social and Political Thought 4-5 (1981). Feminists argue not only that women deserve justice within families and sexual relationships, but that women's lack of power in the private realm translates into inequality in the public worlds of politics and the marketplace. See Okin, supra note 269, at 113-14. The identification of women with the private realm has historically been used to defend women's continued inequality in the political, civic, social, and economic aspects of

the public sphere.

n271 "When the law of privacy restricts intrusions into intimacy, it bars changes in control over that intimacy through law. The existing distribution of power and resources within the private sphere are precisely what the law of privacy exists to protect." Catharine A. MacKinnon, Towards a Feminist Theory of the State 193 (1989).

n272 See Okin, supra note 269, at 9-13 (private sphere should be subjected to the tests for justice that govern other basic social institutions).

n273 See id. at 19-40, 126.

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Political definitions of what should and should not be private shift over time with changing views about the proper balance between social justice and individual liberty, as well as with evolving beliefs about who rightfully belongs to the political community. Consider that only since the 1960s has racial and sexual bigotry on the job become a matter for public concern, and only since the 1980s has extortion of sex as a condition of employment for women workers been treated as anything [*440] other than an employer's unfortunate but nevertheless "private" sexual preference. n274 The historical contingency of the line between public and private applied to the workplace reminds us that it is possible (and, from a feminist perspective, necessary) to rethink the public-private dichotomy as it is applied to the bedroom. Privacy as a legal and political value cannot be discussed meaningfully in absolute terms. Instead, it must be more carefully defined, giving due attention to women as members of the political community, and to our society's sometimes conflicting commitments both to protect persons from coercion and to ensure sexual liberty and privacy.

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n274 See 42 U.S.C. @ 2000e-2 (1988) (prohibition against race and sex discrimination in employment). In 1980, the Equal Opportunity Employment Commission (EEOC) first issued guidelines defining workplace sexual harassment as a form of employment discrimination, see 29 C.F.R. @ 1604.11(a) (1992), and the Supreme Court in 1986 recognized the existence of a Title VII cause of action for workplace sexual harassment. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-69 (1986).

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The tension between privacy and other rights has been evident in the reported sexual fraud cases. Defendants have sought to dismiss claims of liability for sexual fraud as intrusions on their sexual liberty and privacy, characterizing these disputes as matters of private rather than public concern. Given the conflicting political values at stake, it is perhaps not surprising that courts have disagreed on the extent to which privacy is a valid defense against sexual fraud claims. For example, in Stephen K. v. Roni L., n275 a claim brought by a man against his female sexual partner for misrepresenting her use of birth control, a California appeals court ruled that the plaintiff's claims concerned "conduct so intensely private that the courts should not be asked to nor attempt to resolve [them]." n276 Only two years later, however, another California

appeals court explicitly rejected the privacy rationale of Stephen K., in a fraud action brought by a woman against her male sexual partner for misrepresenting his infertility. In Barbara A. v. John G., n277 the court ruled that "the right to privacy . . . does not insulate a person from all judicial inquiry into his or her sexual relations." n278 One year later, a third court in the same state held that "[t]he right of privacy is not absolute, and in some cases is subordinate to the state's fundamental right to enact laws which promote public health, welfare and safety, [*441] even though such laws may invade the offender's right of privacy." n279

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n275 164 Cal. Rptr. 618 (Ct. App. 1980).

n276 Id. at 619. The court observed:

The claim of Stephen is phrased in the language of the tort of misrepresentation. Despite its legalism, it is nothing more than asking the court to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct. To do so would encourage unwarranted governmental intrusion into matters affecting the individual's rights to privacy.
Id. at 620.

n277 193 Cal. Rptr. 422 (Ct. App. 1983).

n278 Id. at 431.

n279 Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276 (Ct. App. 1984) (citing Barbara A., 193 Cal. Rptr. at 430).

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Lower courts have long had to balance claims of individual liberty and privacy in sexual matters against the competing public interest in preventing coercive sexual relations. Privacy has constitutional dimensions, but it is not an absolute right. n280 When confronted with evidence of coercive sex, courts routinely hold that the wrongdoer's right to privacy must yield to the state's interest in promoting health, safety, and welfare. n281 Tort law has traditionally been concerned with a person's right to be let alone -- to be free from harm by others, as well as free from interference with her privacy and autonomy. When issues of sexual conduct arise, the tension between one person's right to be protected from harm and another's sexual freedom is brought to the fore. But when it is clarified that the tension in a particular case arises between the interests of a wrongdoer and those of a victim, privacy rights should not shield otherwise unlawful or tortious conduct.

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n280 Constitutional protections for sexual privacy are today in extreme flux. The Supreme Court's pronouncements on the constitutional right of sexual privacy are among its most controversial ever, and they are consequently the most likely to be affected by changes in the surrounding political climate. See Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 738-39 (1989).

n281 See State v. Bateman, 547 P.2d 6 (Ariz. 1976) (upholding against privacy challenge husband's sodomy conviction for forced oral sex with his wife); Commonwealth v. Arnold, 514 A.2d 890 (Pa. Super. Ct. 1986) (holding that policies of family or sexual privacy do not shield child sexual abuse from legal scrutiny); see also Doe v. Roe, 267 Cal. Rptr. 564 (Ct. App. 1990) (rejecting right of privacy as shield from liability for negligent transmittal of herpes); State v. Dutton, 450 N.W.2d 189 (Minn. Ct. App. 1990) (holding that professional counselor's privacy right does not bar prosecution under statute criminalizing psychotherapist-patient sex).

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Not all legal claims for sexual privacy are grounded in constitutional doctrine, however. Privacy is also an important public policy value, protecting the interests both of individuals and communities. Privacy preserves fragile human values of individuality, autonomy, and dignity n282 from the tyranny of majorities and the state. n283 Privacy is also the social medium for sex and romance, nurturing exchanges of pleasure and emotional sustenance. n284 But sexual privacy is an implicitly [*442] oxymoronic notion: Romantic and sexual partners like to be "alone" -- together. The relational nature of sexual exchange necessarily creates problems of justice, as does the recognition that society has an interest (because of the effect on individuals) in sexual expression. Because legitimate sexual interests of persons other than wrongdoers may be affected if the scope of sexual regulation expands, I must consider whether a tort of sexual fraud will chill consensual sex.

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n282 John Stuart Mill's argument for privacy has been perhaps the most influential among American legal thinkers. Mill observed that the individual is ordinarily the best judge of his or her own good, and that the freedom to direct one's own life develops one's capacities for reason, responsibility, and judgment. See Mill, supra note 180, at 59-64; see also Stanley I. Benn, Privacy, Freedom, and Respect for Persons, in Privacy: NOMOS XIII 1, 15-26 (J. Roland Pennock & John W. Chapman eds., 1971) (arguing that privacy is of paramount importance to human dignity, personhood, and communal life).

n283 Mill argued that a broad right of privacy not only enhances personal well-being and growth, see Mill, supra note 180, at 113-15, but also protects society against the evil of overreaching government, see id. at 56-57.

n284 Privacy is essential for the formation of intimate, loving, trusting relationships. See generally Robert S. Gerstein, Intimacy and Privacy, 89 Ethics 76 (1978) (discussing interdependence of privacy and intimacy). By preserving our control over personal information, privacy allows us to shape our relationships with others and to regulate whom we accept as intimates. See James Rachels, Why Privacy Is Important, 4 Phil. & Pub. Aff. 323, 331 (1975); see also Anita L. Allen, Uneasy Access: Privacy for Women in a Free Society 47 (1988) (emphasizing privacy's role in enhancing interpersonal relationships).

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In claiming sexual privacy, people seek not to have to account to others for their sexual choices. n285 The desire to be secluded from or inaccessible to the judgment and interference of others is neither selfish nor antisocial --

unless privacy is being used to avoid the responsibility not to harm others. Those who cause no harm to others by their sexual choices should enjoy freedom of sexual conscience and conduct, and a wise society will invoke privacy values to shelter the sexual liberty of its citizens. Privacy, for example, should protect an individual's freedom to seek sex by any genuinely consensual means, including relationships that might shock, anger, or disgust others. This liberty to dissent from majority sexual values encompasses gay and lesbian sex, interracial sex, and promiscuous, premarital, or extramarital sex between men and women. n286 Second, privacy should allow people to change their minds about earlier commitments and move on to new sexual partners. n287 The first privacy interest might be called that of sexual dissent, and the second that of sexual mobility.

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n285 Although the term "privacy" can be used (as Mill does) to refer to a shield against government efforts to interfere with individual choices, the better word might be "liberty," because what the individual claims is a right to be free from outside interference in certain spheres of life. See Allen, supra note 284, at 99.

n286 This list is not meant to be exhaustive, but merely to point to categories of sexual relationship that in the past have been regulated in the service of conventional sexual morality, rather than to compensate harms.

n287 Even the most genuinely expressed feelings of love and sexual desire can change, and when feelings change, a lover often wants the chance for a fresh start. The chance to rethink prior commitments and to change course in the midst of one's life is essential to personal and sexual autonomy. See Jeremy Waldron, When Justice Replaces Affection: The Need for Rights, 11 Harv. J.L. & Pub. Pol'y 625, 645 (1988) (ability to step back from, analyze, and even leave behind intimate relationships is good because it often enhances individual autonomy and leads to change in larger society). Although society might prefer greater relational stability, so long as there has been no actionable reliance by the abandoned partner, the law should permit sexual mobility.

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Some libertarian critics, however, see the law as too crude an instrument for the delicate task of distinguishing consent from coercion in any but the most graphic instances of sexual imposition. According to this argument, sexual regulations requiring refined judgment are [*443] likely to be too broadly enforced and thus wrongly intrude on genuinely consensual sex. Furthermore, assuming that human sexual contact is a social good, libertarians argue that it is better to have under-inclusive laws than to risk over-deterrence. Focusing on sexual harassment, Lloyd Cohen argues that increased sexual regulation threatens the "dance of courtship." n288 Professor Cohen fears that the very prospect of governmental regulation will discourage men from initiating legitimate sexual activity. If legal rules make men too afraid to make sexual overtures, he warns, "the social preliminaries to romantic union may never occur" and men and women will have less sexual contact. n289 Given that both men and women crave human connection, Cohen suggests, a broad tolerance of aggressive sexual communication serves the desirable utilitarian goal of encouraging sexual activity -- even though such latitude might also permit more coercion. n290 Cohen pleads for "recognition of, and sensitivity to, the

delicate social institution we are affecting." n291 In the final calculus, he believes that the social cost of effective legal protections from sexual coercion is too great compared to the resulting benefits. n292

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n288 Lloyd R. Cohen, Sexual Harassment and the Law, Society, May-June 1991, at 8, 10-13. Although Cohen qualifies his skepticism of sexual regulation by affirming that "traditional criminal and tort penalties for sexual offenses . . . should be enforced more vigorously and be punished more harshly," id. at 13, he would almost certainly reject this Article's proposal to revise the traditional tort regime by imposing greater accountability for individuals' conduct in initiating sex.

n289 Id. at 10. Cohen adds:

Unwelcome sexual advances by men, and the apprehension of such advances, are a real and unpleasant backdrop in the lives of women. Likewise, prosecutions, the fear of prosecutions, and more importantly, social disapproval and the fear of social disapproval for being too forward form the backdrop for men's lives. Acting out of their respective fears, members of both sexes adjust their behavior to the legal and social climate.
Id.

n290 See id. at 10.

n291 Id.

n292 See id. at 12 (asserting that it is insufficient merely to argue that certain forms of sexual communication are bad, since social costs and effectiveness of available remedies must be factored into decision whether to regulate).

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Cohen's analysis rests upon a speculative and one-sided picture of sexual behavior and values, which in turn leads him to suggest that the sexual marketplace is better off with minimal regulation. For instance, Cohen asserts that as new definitions of sexual coercion emerge, men's fear of liability will reach a level at which they are seriously discouraged from approaching women for sex. n293 Yet even if some men do feel confused by new sexual norms, sexual activity remains so central to men's vision of the good life that it is hard to believe Cohen's suggestion that men will rationally calculate that sex has simply become too much trouble. n294

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n293 See id. at 10.

n294 See generally Barbara Ehrenreich, The Hearts of Men: American Dreams and the Flight from Commitment (1983) (tracing men's continual willingness to renegotiate price of sexual access to women from late 1950s to present).

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[*444] More importantly, Cohen's utilitarian calculus of the "chilling" consequences of increased sexual regulation (in short, the loss of sexual privacy or liberty) almost entirely ignores women's interests. Cohen understands that negotiating the beginning of a sexual interaction can be intimidating for the partner who takes the lead, which he presumes is a man. n295 Yet he ignores the possibility that in a more sexually secure environment, women may be more responsive to invitations, and perhaps more willing to risk initiating sex themselves. Even Judge Posner perceives that "[i]f legal changes make men less aggressive in initiating [heterosexual] dating, we can expect women to become more aggressive. The amount of dating may not fall significantly." n296 For women, negotiating the deregulated sexual marketplace that Cohen favors is like venturing into Hobbes' fearsome "state of nature," where "Force, and Fraud, are . . . the two Cardinall vertues." n297 Under such conditions, many women resist sexual overtures, fear sexual adventure, and take on a self-protective modesty or numbness in order to lower the risks of sexual desire. If sexual response implies surrender of one's right to be protected from sexual appropriation, sexual feeling may become associated with erasure of the self, generating ambiguous feelings about the act of sex itself. Greater personal security and a realization of the ideal of voluntariness in sexual relations, on the other hand, is likely to encourage female sexual venturesomeness. What Cohen misses is that if men's fear of overreaching government regulation dampens sexual spark and possibility, so too does women's fear of sexual coercion.

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n295 See Cohen, supra note 288, at 10.

n296 Posner, supra note 168, at 395.

n297 See Thomas Hobbes, Leviathan 90 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (freedom requires the willingness to give up some power and create government in order to leave behind the "state of nature," where "every man [wars] against every man[,] . . . [w]here . . . there is no Law: where no Law, no Injustice[,] . . . [where] Force, and Fraud, are . . . the two Cardinall vertues").

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I cannot assure Cohen or privacy advocates that there is no risk that sexual regulation will interfere with legitimate and positive sexual expression -- only having no laws at all can provide complete assurances against abusive law enforcement. But men's "peace of mind" is a shockingly abstract and intangible interest for which to sacrifice the far more basic interest of women in bodily integrity and sexual autonomy. When these interests compete in determining the boundaries of sexual coercion, only a utilitarian calculus that severely overvalues men's sexual prerogatives will discount women's autonomy interest so dramatically.

[*445] D. Problems of Proof: Lying Women, Imagined Injuries, Sexual Fantasy, and Swearing Contests

Although many legal commentators acknowledge that fraudulently gaining another person's sexual acquiescence is morally culpable, few are willing to take the next step by defending a legal remedy. Citing pragmatic difficulties

in adjudicating claims clouded by the social complexities of sexual communication, discussions of sexual fraud in the legal and philosophical literature commonly conclude with expressions of skepticism about the feasibility of legal redress. n298 Underlying this hesitation to remedy an admitted wrong is the powerful presumption that disputes between sexual intimates are categorically different from other human conflicts, and therefore present unique and difficult proof problems not easily handled by the existing tools of legal truthfinding. n299 Because ordinary legal processes are inadequate for the task of adjudication, it is argued, sexual fraud claims cannot be fairly heard or decided, and victims must be denied a remedy.

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n298 See, e.g., Posner, supra note 168, at 393; Dripps, supra note 168, at 1802-03. This skepticism is by no means unanimous. Professor Estrich concludes that fraudulently nonconsensual sexual relations should be included within the definition of rape in the same manner, and to the same extent, that extortion or fraud falls within the loose definition of robbery. See Estrich, supra note 168, at 1119-21.

n299 Another source of the caution may be the fact that important parts of the scholarly discussion focus not on possible tort remedies, but rather on the distinct issue of criminalizing rape by fraud. See, e.g., Posner, supra note 168, at 392-93; Dripps, supra note 168, at 1792-97; Schulhofer, supra note 166, at 88-93. Criminal sanctions impose weightier penalties, and thus demand greater social consensus on the wrongfulness of the conduct involved. In the criminal context, fair-minded scholars are perhaps right to resolve any doubt in favor of defendants. Professor Schulhofer argues that the absence of "clear social consensus about the circumstances in which misrepresentation in matters of sexual intimacy is improper" makes sexual deception a "matter[] better left to the individual." Id. at 92.

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Certainly these process skeptics point to real issues. In defining its prohibitions, the law must take into account not only the morality of conduct, but also all the problems related to enforcing the rules that are adopted. These include the evidentiary difficulties of reconstructing past events and determining the motives of persons charged with violating the rule, as well as the costs of enforcement. Accordingly, the law may be forced to tolerate some bad conduct simply because it is difficult or impossible to prove.

The fraudulent misrepresentation rule requires truthfulness, not access to absolute truth. To confuse the two is to mistake ethics for epistemology. n300 Certainly, self-knowledge of our experiences, feelings, and intentions is hard enough to gain, much less to convey accurately to another person. Once we speak, it is hard to control how we are understood and, in a later dispute over interpretation, hard to determine whose version of the "truth" about the exchange is truer. In [*446] an epistemologically absolute sense, no single truth may inhere in a particular exchange. Yet human experience tells us that truthfulness is an apprehensible moral idea: "As dupes we know what as liars we tend to blur -- that information can be more or less adequate; that even where no clear lines are drawn, rules and distinctions may, in fact, be made; and that truthfulness can be required even where full 'truth' is out of reach." n301 One premise of the tort of sexual fraud is that a standard of "truthfulness" is

both comprehensible as a legal standard of expected conduct and capable of being judged by a trier of fact, even in the face of competing witness testimony.

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n300 See Bok, supra note 177, at 6.

n301 Id. at 13.

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The procedural objections n302 to a tort remedy for sexual fraud reflect four concerns: (1) that plaintiffs will bring false claims; (2) that the emotional injuries of sexual fraud are unreal, imagined, or irremediable; (3) that women and men desire to be lied to as part of erotic fantasy; and (4) that too many cases of sexual fraud will end up as unresolvable "swearing contests." The first and second objections assume that existing systemic safeguards are not adequate protection against false or exaggerated claims; the third, that we give our implicit prior consent to sexual lies; and the fourth, that litigation processes cannot reconstruct a reliable "truth" about an emotional and contested sexual dispute.

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n302 In using the term "procedural objection," I mean to differentiate skepticism about the feasibility of affording effective remedies from rights-based objections. Rights-based objections include the belief that sexual fraud causes no real harm and the claim that fraudulently procured consent to sex invades no protected interest (such as sexual autonomy). The rights-based objections to sexual fraud presented by Richard Posner and Joel Feinberg are discussed above. See supra notes 196-206 and accompanying text. Some objections can be stated in the form both of a process objection and a justification or excuse. See the discussion of lying as sexual fantasy, infra notes 323-332 and accompanying text.

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1. Lying Women. -- Images of "gold diggers" and other sexual schemers were a staple of the legislative campaigns in the 1930s to abolish the common law seduction tort. n303 The persistence of these suspicions is evident in the dissent from a 1991 decision that upheld a woman's claim for injury arising out of an exploitative sexual relationship with her psychotherapist. Decrying the majority's judgment, an Illinois judge impugned the plaintiff's motives: "To hold the defendant legally liable . . . is to countenance a legal form of extortion or blackmail. . . . The plaintiff, having willingly engaged in a frolic, now seeks to use the legal system as a tool for a shakedown." n304 Citing the same risk of process abuse, the dissenting judge in Parker v. Bruner declared that all sexual fraud claims, merited or not, should be barred. n305

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n303 See supra notes 82-92 and accompanying text.

n304 Corgan v. Muehling, 574 N.E.2d 602, 611-12 (Ill. 1991) (Heiple, J., dissenting).

n305 Parker v. Bruner, 686 S.W.2d 483, 489 (Mo. Ct. App. 1984), aff'd, 683 S.W.2d 265 (Mo.) (en banc) (Greene, C.J., dissenting) (declaring that "modern women are not easily misled by panting males with sexual propositions"), cert. denied, 474 U.S. 827 (1985). The dissenting judge in Parker urged abolition of the seduction tort as "subject to great abuse, as it provides a fertile field for blackmail, extortion and perjury," resting solely on "the allegations of the allegedly deflowered female." Id. (Greene, C.J., dissenting). It is revealing that, throughout his opinion, the dissenting judge in Parker referred to the female plaintiff as "Alice" and the male defendant as "Bruner."

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[*447] Even if one is skeptical about the reliability of proof in sexual fraud cases, the aspersions cast on the characters of sexual fraud plaintiffs are disturbing. The "unworthy plaintiff" argument recalls similar assertions -- only recently deleted from the standard legal treatises on evidence -- that sexually active women are naturally untruthful and prone to make false sexual accusations. n306 Research about the prosecution of rape has demonstrated that myths about women's sexual dishonesty continue to play an important role in the way judges, juries, and the public hear women's accusations of sexual wrongdoing. n307 Deep-rooted skepticism about the credibility of female accusers has been an important factor in the lackluster enforcement of rape laws, from the common-law era n308 to the present. n309

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n306 See, e.g., 3A John H. Wigmore, Evidence in Trials at Common Law @ 924a (James H. Chadbourn ed., rev. ed. 1970) (claiming that the "psychic complexes" of sexually active women "find[] . . . direct expression in the narration of imaginary sex incidents"). Based on this "fact," it was once a standard jury instruction in rape cases that the charge of rape is easy to make and hard to prove, and harder for the accused to defend. See Leigh Bienen, Mistakes, 7 Phil. & Pub. Aff. 224, 234 (1977) (paraphrasing jury instruction given by Lord Hale).

n307 See Toni M. Massaro, Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony, 69 Minn. L. Rev. 395, 417-24 (1985); Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. Davis L. Rev. 1013, 1027-31, 1040-57 (1991).

n308 See Anna Clark, Women's Silence, Men's Violence: Sexual Assault in England, 1770-1845, at 52-55 (1987); Frank McLynn, Crime and Punishment in Eighteenth-Century England 106-08 (1989).

n309 See Estrich, supra note 155, at 17-19, 25, 114 n.41 (describing prosecutorial practice, due to skepticism about victims' credibility before a jury, of dismissing or downgrading rape complaints that meet legal definition of the crime).

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Such attitudes doubtless affect the debate over the workability of a remedy for forms of sexual wrongdoing less reprehensible than rape. No evidence corroborates the belief that women lie about sex more than men. To the

contrary, research shows that all forms of sexual coercion tend to be disproportionately underreported to legal authorities. n310 Without factual support, bias against women as sexual accusers cannot justify denying them a legal remedy for sexual fraud. The very purpose of the adjudicative process is to discriminate between true and false claims.

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n310 For example, there are no more false charges of rape than of any other violent sexual crime. See [Prosecutors' Vol. II] National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Admin., U.S. Dep't of Justice, Forcible Rape: A Manual for Filing and Trial Prosecutors 4 (1978).

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[*448] 2. Imagined or Irremediable Injuries. -- The emerging case law of sexual fraud reflects a marked judicial unwillingness to allow full recovery for emotional injury. n311 This pattern of undercompensating emotional harm is evident across all categories of tort, n312 and it reflects concerns not confined to theories of sexual wrongdoing. n313 Both in its liability and damages rules, tort law values physical security and property more highly than emotional security and human relationships. n314 Emotionally harmed people are often advised to "toughen their hides" n315 -- that is, to accept their pain as part of the risk of living and not to burden others. n316 Many of these arguments bear a striking resemblance to the anti-heartbalm rhetoric of the early twentieth century. n317

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n311 See supra part I.A.

n312 All jurisdictions restrict recovery of damages for emotional injury to a greater extent than they restrict recovery for physical injury. See Bell, supra note 160, at 334.

n313 Underlying this judicial wariness about emotional distress claims is a tangle of suspicions, open or hidden, that emotional injuries are somehow not "real," that claims for such suffering are routinely falsified or exaggerated in severity, and that the true cause of emotional suffering is the victim's "hysterical" or overly sensitive nature rather than the defendant's wrongdoing. See David B. Morris, The Culture of Pain 9 (1991).

n314 See Martha Chamallas & Linda K. Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich. L. Rev. 814, 814 (1990).

n315 See, e.g., Calvert Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1035 (1936) (suggesting that "toughening of the mental hide" provides safeguards superior to legal protection from harm).

n316 It is true that each person suffers a measure of emotional misery in life without any intentional wrongdoing or legal recourse. But a glance back at older cases reveals the historical contingency of society's judgment about how much and what kinds of suffering we are expected to accept as inevitable in life. In the nineteenth century, for example, the Supreme Judicial Court of Massachusetts denied recovery to a railroad worker whose hand was crushed in a

workplace accident. In his oft-cited opinion, Judge Lemuel Shaw reasoned that the injury was "like those to which all men, in all employments, and at all times, are more or less exposed." Farwell v. Boston & W. R.R., 45 Mass. (1 Met.) 49, 59 (1842).

n317 See supra notes 83-116 and accompanying text. The idea that seeking damages for emotional injury casts a shadow on the plaintiff's motive persists today, among progressives as well as conservatives. See Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, Minority Critiques of the Critical Legal Studies Movement, 22 Harv. C.R.-C.L. L. Rev. 323, 394-95 (1987) (noting attitude, but not approving it); see also Radin, supra note 221, at 1875-77 (exploring risk that compensation for "intangible injuries" will commodify personal experiences).

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Feminist scholars have persuasively argued that the persisting suspicion of emotional injury betrays hidden bias against women. n318 In contrast to its relative disdain for emotional and relational interests, tort law's responsiveness to physical and economic loss skews the law against women's interests and activities. As "emotional workers" traditionally held responsible for nurturing the personal qualities conducive to emotional intimacy and relational trust, n319 women are more likely to [*449] be exposed to (and hence suffer) emotional injury than men. Conversely, men, who traditionally perform the greater share of society's physical labor, handle dangerous machinery, and own and manage property, are more likely to incur physical and economic injury. Shaped by this gendered division of work and leisure, formal legal rules and informal biases disfavoring emotional injury recovery tend to marginalize women and their injuries. Full compensation for the types of injuries that are the foreseeable result of sexual fraud requires a challenge to this endemic imbalance in the tort regime.

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n318 Professors Chamallas and Kerber have developed this argument with respect to bystanders' right to recover for emotional distress cause by fright-based injuries. See Chamallas & Kerber, supra note 314, at 814-16.

n319 See Arlie Russell Hochschild, The Managed Heart: Commercialization of Human Feeling 164-70 (1983) (women take on role of "emotional managers" and "do extra emotional work" to affirm and enhance the well-being and status of others). Hochschild refers to women's emotional work as "shadow labor," an unseen effort that society does not count as labor. "As with doing housework well," Hochschild observes, "the trick is to erase any evidence of effort, to offer only the clean house and the welcoming smile." Id. at 167. Women's role as emotional workers has followed them out of the home and into the workplace, where women are overrepresented in job categories demanding public contact and personal attendance to the psychic needs of others. Whereas over a third of all job categories require emotional labor, only a quarter of jobs held by men and more than half of all jobs held by women involve this type of work. See id. at 171.

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3. Sexual Fantasy. -- Underlying many of the arguments against creating a legal remedy for sexual fraud is the notion that lying is integral to the "dance" of sexual initiation and negotiation. Exaggerated praise, playful suggestions, efforts to impress, and promises intended to reassure and trigger emotion (but not to be strictly believed) are all part of the ritual of escalating erotic fascination that makes up a "seduction" in the colloquial sense. To lie to a sexual partner is to share a leap of fancy -- all very harmless and justifiable. After exploring this controversial idea, one commentator concludes that it is commonly held, hard to prove or disprove, and ambiguous in its public policy implications. n320 Stephen Schulhofer points out that many sexual encounters involve fantasy and an escape from reality, and that sexual partners often welcome storytelling for purposes of erotic excitement, enhancement of a romantic "mood," or simple emotional reassurance. n321 "We want to believe and often need to hear these statements," he comments, "even though we have conflicting thoughts about whether the speaker means to be believed and whether we do or do not believe him." n322 Professor Schulhofer suggests that such an awareness of "[t]he complexity of emotional 'truth'" may explain some of society's present reluctance to remedy sexual fraud. n323

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n320 See Schulhofer, supra note 166, at 91-93. Professor Schulhofer has courageously stimulated public debate about the role that this belief plays in shaping attitudes about sexual regulation, despite its subscribers' unwillingness to state or defend the belief publicly. While Schulhofer defends the importance of the sexual fantasy factor, he has been careful to condemn as "inaccurate and offensive" the blanket assumption that people generally want or need to be lied to about sex. See id. at 92.

n321 See id. at 91-92.

n322 Id.

n323 Id. at 93.

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[*450] When fantasy is an explicit part of a sexual encounter, partners may openly agree in advance to "tell stories." But this rationale does not reach the more common scenario, which depends upon a construct of implied consent: one partner tacitly wants to be lied to, and the other silently infers his lover's consent to an erotic charade. This justification for lying based on implied consent was once quite common, for example, in both medical and adoption settings: Doctors believed that patients should be lied to about the risks of surgery or impending death, and parents routinely lied to their adoptive children about their biological connection to the family. n324 In the sexual realm, the parallel argument is that because our repressive society shames and silences sexually eager women, a woman may need her partner to tell a story about what is really happening in a sexual encounter, in order to overcome her socialized need to act like a "good girl." n325

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n324 See Bok, supra note 177, at 220-26, 261.

n325 See Chamallas, supra note 114, at 832; see also Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L.J. 55, 67 (1952) (arguing that women often harbor "an unconscious desire for forceful penetration, the coercion serving neatly to avoid . . . guilt feelings")).

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Sissela Bok would classify lies told to stimulate sexual fantasy as "paternalistic," a category of untruths told for what the liar believes are noble purposes. n326 According to Bok's framework, the paternalistic liar assumes a lie is necessary to educate, enable, or protect another person at some stage in their encounter; should the lie come to light at a later stage in their relationship, the paternalistic liar assumes the deceived will not complain, and will even be grateful for the deception. In contrast to self-serving lies, paternalistic lies at least possess a veneer of altruistic motive. Of course, this claim of implied consent is also a defensive moral stance: If the deceived secretly welcomed the lie because it served her purposes in the immediate moment, she waives her right to protest the harms that may later come to her because of her hidden consent. n327

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n326 See Bok, supra note 177, at 168.

n327 See id. at 203-19. We have come to doubt the paternalistic justification for lies in other settings. Informed consent to important medical procedures is now mandated in all jurisdictions, and a basic tenet of medical ethics holds that it is always proper to tell a terminally ill patient of impending death except in exceptional circumstances. Adoptive children are now routinely told of their status. See id. at 216-17.

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Certainly, the burden should fall upon the advocates of paternalistic lying to prove that an admittedly intentional misrepresentation was undertaken in the recipient's best interests. n328 The sometimes consensual [*451] nature of sexual lying for purposes of mutual fantasy does not justify a general tolerance of sexual deceit. Such an occasional practice affords no basis for a general principle of sexual relations, and a presumption that men and women are rationally interested in protecting themselves from harm should ordinarily apply.

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n328 Existing standards of tort liability for intentional fraud require that the plaintiff prove that the defendant knew and intended to deceive, but I am speaking here of the burden of proof regarding what amounts to an affirmative defense. In the fraudulent misrepresentation case law, the motives for an intentional, harmful misrepresentation do not alter the fact of liability. See Keeton et al., supra note 152, @ 107, at 741. This burden-of-proof question highlights an important difference between criminal and civil remedies: because of the weighty penalties and stigma attached to criminal liability, there are good reasons to give criminal defendants the benefit of the doubt. In the tort context, however, no such justification exists for favoring wrongdoers over

victims on principle.

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4. Swearing Contests. -- Because sexual interaction typically occurs in private, and rarely yields direct corroborative evidence about the words, actions, or motives of the participants, it is often difficult to adjudicate charges of sexual wrongdoing. Since accusations of sexual abuse increasingly arise between friends, family members, or colleagues, no conclusive generalized inference can be drawn from the prior relationship of the disputants. n329 Often, the result is what has come to be known as a "swearing contest" -- a credibility battle pitting the unsupported testimony of the complainant against that of the defendant.

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n329 Public attitudes towards rape, as well as the existing pattern of enforcement of rape laws, indicate that the fact of a prior relationship between the alleged victim and perpetrator significantly affects the credibility of the victim's allegation that a particular encounter was a rape. See Estrich, supra note 155, at 17-18 (summarizing research on outcomes in stranger versus acquaintance rapes). Allegations of rape by a stranger are significantly more believable to police, prosecutors, and the public than allegations of rape by an acquaintance. Id. The reasoning seems to be that it is unlikely that a woman would choose to have sex with a stranger who accosted her in a dark parking lot, but far more possible that she might agree to sex with a friend or acquaintance. The credibility of the woman raped by a stranger is strengthened by such inferences from common human experience; by contrast, the woman raped by a friend or acquaintance must be believed -- or not -- on the strength of her own credibility as an individual.

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Reflecting a general distrust of the legal system's ability to evaluate complex human motivations in such "he said-she said" disputes, skeptics single out sexual disputes as uniquely beyond the scope of ordinary reason and judgment. n330 As one court put it: "Relationships may take varied forms and beget complications and entanglements which defy reason." n331 In the same vein, Judge Posner comments on the "exquisite[] difficult[y]" of litigating the distinction between an initially false statement of one's sexual or romantic feelings and a later change in those feelings. n332 Professor Schulhofer notes that deciding what might have been material to one's decision to consent to sex can be murky, given that sexual activity is usually pleasurable enough to motivate consent without other inducements. n333

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n330 To my knowledge, for example, no process skeptic proposes to close the courthouse door to the typical contract dispute or vehicular accident unless corroborating evidence is available.

n331 Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 246 (Sup. Ct. 1985).

n332 Posner, supra note 168, at 393.

n333 Schulhofer, supra note 166, at 90 (citing Model Penal Code @ 213.3 (1980)).

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[*452] These concerns reflect an awareness that a person who takes a risk is apt to feel, when the risk does not pay off, that the original arrangement was somehow unfair. Such disappointments are common, and often result from causes entirely unrelated to misrepresentations made in the course of the exchange. Thus, even if an accuser is not consciously lying, her subjective recollections may be colored by rationalizations that render them unreliable as a measure of past events. Fraud, as it has evolved in the common law, is a finely balanced screen for such before-and-after perceptions. The action for misrepresentation does not allow a disappointed party to easily avoid the consequences of her own past choices. Under existing law, one who trusts another cannot, without more, impose any obligation on that person. Not only must the trust be induced by an intentional deception, but the trusting person must have been reasonably careful about safeguarding her own interests. The underlying philosophy of the action for misrepresentation is that one who trusts or relies upon another must show some justification for doing so. n334 When the existing legal framework of misrepresentation is understood to create the boundaries for liability, fears about the feasibility of proving sexual fraud appear overstated.

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n334 For a discussion of the boundaries of intentional misrepresentation, see infra Part III.

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The most radical and sweeping form of skepticism about proof of sexual fraud is the claim that love and sex are inherently unknowable, and thus beyond the reach of any mechanism of rational social judgment and regulation. Critic Camille Paglia asserts that "[t]he element of free will in sex and emotion is slight. As poets know, falling in love is irrational." n335 If sex is by definition irrational, this argument goes, any attempt to regulate it must fail; men and women alike must accept the existing distribution of sexual consequences (what Paglia calls "nature's fascism") as inevitable and unchangeable:

> Sexuality is a murky realm of contradiction and ambivalence. It cannot always be understood by social models, which feminism, as an heir of nineteenth-century utilitarianism, insists on imposing on it. . . . It cannot be "fixed" by codes of social or moral convenience, whether from the political left or right. For nature's fascism is greater than that of any society. There is a[n] . . . instability in sexual relations that we may have to accept. n336

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n335 Camille Paglia, Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson 4 (1991).

n336 Id. at 13.

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Yet Paglia's claim that the truth about sex is unknowable again falsely conflates ethics and epistemology: n337 Though it may not be possible to ascertain absolute truth, it is possible to address that smaller set of untruths that result from knowing and intentional misrepresentations. n338

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n337 See Bok, supra note 177, at 6.

n338 Declarations that the truth is either nonexistent or beyond apprehension also create a risk of self-serving rationalization, particularly when the person making such a claim stands to gain from a bending of the facts. See Gerald B. Wetlaufer, The Ethics of Lying in Negotiations, 75 Iowa L. Rev. 1219, 1239 (1990).

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[*453] In the preceding section, I have argued that the law should not tolerate loss of free will and autonomy in sexual relations in ways that are unacceptable in other human interactions. By considering the various justifications offered for retaining the sex exception to fraud, I have shown that there is neither a principled nor a pragmatic basis for regulating the sexual sphere so as to permit more predatory conduct than is tolerated in the marketplace. Involuntariness is harmful in and of itself because it destroys autonomy and choice. Violence makes the experience of losing control more terrifying, and the scenarios of certain deceptions can be especially bruising. But however a deception is accomplished, the experience of being sexually used without consent hurts the individual in ways the law has long recognized and condemned in nonsexual settings.

## III. A MODERN TORT OF SEXUAL FRAUD

The tort of sexual fraud proposed in this Article applies the elements of the existing action for intentional misrepresentation to the specific context of lies told for the purpose of inducing sexual consent. I propose the following addition to the Restatement (Second) of Torts:

One who fraudulently makes a misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to consent to sexual relations in reliance upon it, is subject to liability to the other in deceit for serious physical, pecuniary, and emotional loss caused to the recipient by his or her justifiable reliance upon the misrepresentation.

The only modification I propose to the well-established elements of the fraudulent misrepresentation action already contained in the Restatement is to expand the maker's liability to include physical and emotional as well as pecuniary injury. n339 The novelty of my proposal is to apply the misrepresentation theory in a new relational setting.

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n339 Compare this Article's proposed sexual fraud tort with the fraudulent misrepresentation tort defined in the Restatement (Second) of Torts @ 525

(1977):

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation. This expansion of the harm element is discussed infra text accompanying notes 373-382.

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At the core of the misrepresentation theory is a baseline obligation to deal honestly and fairly with others when one is aware that another's well-being is at stake. The tort imposes no general duty not to lie to other people. Rather, the legal duty not to mislead arises only when one knows that dishonesty will cause another person to rely to her detriment. Even when such detrimental reliance has been purposefully [*454] provoked, however, the liar may still escape liability if the recipient was not careful to guard herself against the deception, or if the recipient's reliance, even though justified, resulted in no serious harm.

My proposal of a tort of sexual fraud applies this theory to a new sphere of human interaction. However cautious they may be in innovating or expanding liability, courts have never limited the application of common law concepts to the historical and factual contexts in which they first arose. Such stagnation would be antithetical to the very idea of an evolving common law. Still, legal intervention in sexual relations raises important concerns. Throughout this Article, I have addressed these concerns at the levels of theory and policy. The following section demonstrates how the theory might work in the kinds of factual situations likely to arise in litigation.

By grounding sexual fraud within the model of a well-established legal theory with extensive case law roots and branches, each element of my proposed tort can be defined with reasonable certainty and depth. Courts adopting the sexual fraud theory should do so by extending the logic of their existing tort of intentional misrepresentation, grounding sexual fraud compensation in familiar doctrines and concrete precedents. n340 In this spirit, the following discussion of the legal duties that may arise during negotiations over sexual consent draws on existing law defining the scope of the duty not to misrepresent as it has been established in other relational contexts.

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n340 This incorporation of existing law will have the additional benefit of establishing a consistent standard of sexual conduct from state to state, mirroring the relative harmony of the intentional misrepresentation theory as it has been interpreted in the fifty states and the District of Columbia.

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A. Can Sexual Fraud Be Clearly Defined?

Because fraud claims arise in an astonishing variety of factual settings, courts must adapt a broad legal standard to a wide variety of contexts. n341 Such a flexible and densely contextual approach to liability does not lend

itself easily to expression as a "Code of Sexual Initiation" stating a comprehensive set of "do's" and "don't's." Yet a concern for clearly defined liability standards grows out of the due process value of fundamental fairness: "[I]t is reasonable that fair warning should be given to the world in language that the common world will understand [*455] of what the law intends to do if a certain line is passed." n342 The common law assumes that people are free to choose between lawful and unlawful conduct, and it therefore insists that laws "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and to act accordingly upon that knowledge. n343 On the other hand, "Vague laws may trap the innocent by not providing fair warning." n344 This insistence upon fair warning is even more deeply felt when a proposed law may deter expressive conduct (such as sexual conduct), because a vague or unclear law may "chill" individual expression of great social value. n345

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n341 The courts have long insisted that the definition of fraud must remain general and flexible because fraud itself can take so many forms.

Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean form at will, were courts to cramp themselves by defining it with a hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition. . . . Accordingly[,] definitions of fraud are of set purpose left general and flexible, and thereto courts match their astuteness against the versatile inventions of fraud-doers.
Stonemets v. Head, 154 S.W. 108, 114 (Mo. 1913) (citations omitted). I am grateful to Marshall Shapo for this reference.

n342 McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.). The definiteness concern also requires that the law provide explicit standards for adjudication in order to protect against arbitrary or discriminatory application. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

n343 Grayned, 408 U.S. 104 at 108.

n344 Id.

n345 See id. at 108-09.

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The quest for fair warning through definitional clarity is not a problem peculiar to the contested area of sexual regulation. The courts have long acknowledged that many areas of human conduct cannot be regulated except by broadly stated and sometimes verbally imprecise legal standards. This describes, for example, the many criminal statutes that define unlawful conduct in terms of degree. n346 Similarly, negligence doctrine imposes duties of care that vary depending on the relationship of the persons in question. In Nash v. United States, n347 Justice Holmes gave a memorable gloss to the concept of reasonableness, observing that "the law is full of instances where a man's fate depends on his estimating rightly; that is, as the jury subsequently estimates it. . . . 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.'" n348 The mere fact that a law -- statutory or common law, civil or criminal -- is framed so as to require the jury to determine a [*456] question of